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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1247

THE 931 EAST BOULEVARD COMPANY,

Petitioner,

vs.

CITY OF CLEVELAND, WHITE MOTOR CORPORATION, EATON MANUFACTURING COMPANY, PARK DROP FORGE COMPANY and ROCKEFELLER BROTHERS FUND, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____.

THE 931 EAST BOULEVARD COMPANY,

Petitioner,

vs.

CITY OF CLEVELAND, WHITE MOTOR CORPORATION, EATON MANUFACTURING COMPANY, PARK DROP FORGE COMPANY and ROCKEFELLER BROTHERS FUND, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in this cause on December 6, 1967, overruling petitioner's motion to certify the judgment of the Court of Appeals for the Eighth Judicial District of Ohio, Cuyahoga County, and dismissing petitioner's appeal from the judgment of that court, and the further order of the Supreme Court of Ohio entered in this cause on December 20, 1967, denying petitioner's motion for rehearing.

CITATIONS TO OPINIONS BELOW.

The Supreme Court of Ohio and the Court of Appeals entered their respective judgments without opinion. The opinion of the Cuyahoga County, Ohio, Common Pleas Court is unreported and is printed in the Appendix, *infra*, p. 22.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on December 6, 1967, and petitioner's timely motion for rehearing was denied on December 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

QUESTIONS PRESENTED.

I.

Where neither the appealing party nor its counsel had actual notice of an adverse ruling denying injunctive relief against an unconstitutional appropriation of its real property for private rather than public purposes until time for appeal from that adverse ruling had expired, solely because of counsel's failure to take timely notice of the publication of the adverse ruling in a daily newspaper used by the court to publish such notices, does such denial of the right to appeal constitute a denial of due process and equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution?

II.

Where, in an action to enjoin an unconstitutional condemnation of property for private rather than public purposes, notice of an adverse decision in the action is given by publication pursuant to court rule, rather than by mail or personally to counsel of record, and counsel fails to obtain actual notice of the decision until time for appeal from the decision had expired, is such notice by publication inadequate to satisfy the due process clause of the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States.

Amendment XIV, Section 1, Clause 2:

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes.

The pertinent text of each of Ohio Revised Code Sections 2321.19, 2505.04, 2505.07(A), 2701.09 and 2703.16 is reprinted in the Appendix, *infra*, pp. 42-44.

STATEMENT OF THE CASE.

Petitioner sought in the Common Pleas Court of Cuyahoga County, Ohio, to enjoin respondent City of Cleveland from proceeding to trial in an action it had previously commenced against petitioner to appropriate petitioner's land. The corporate respondents were joined as parties defendant upon allegations that they and the City of Cleveland had conspired to deprive petitioner of its property. In addition to injunctive relief, petitioner prayed for damages resulting from the conspiracy.

The questions presented in this petition for a writ of certiorari do not relate to the substantive issues which petitioner would have presented to the Supreme Court of Ohio, had it been able to perfect an appeal to that court. However, for the purpose of deciding this petition for certiorari, the merits of the action should be noted.

Petitioner sought to enjoin the taking of its property because the attempted appropriation was for the purpose of satisfying the private interests of the corporate respond-

ents, by substituting petitioner's land, which adjoins a large tract of land deeded to the City of Cleveland by John D. Rockefeller upon condition that it be used exclusively for park purposes, for a parcel of the Rockefeller park land of similar size, which, pursuant to the scheme, was to be sold to the corporate respondents to be used as a parking lot for their employees. The "exchange" of real estate thus contemplated would enable the corporate respondents to acquire a parking lot and the City of Cleveland would not jeopardize its right to the continued use of the remaining Rockefeller park land, which, under Rockefeller's deed of gift, would revert to the use of respondent Rockefeller Brothers Fund, Inc. if any part of the land were used for other than park purposes.

Upon trial of the case, the trial judge found for the respondents.[1] An appeal on questions of law and fact was taken to the Court of Appeals for the Eighth Judicial District of Ohio, Cuyahoga County, which upon hearing the case *de novo* entered judgment, without opinion, for respondents and, in addition, vacated a temporary restraining order issued by the trial court at the commencement of the action.[2]

On February 10, 1967, within the time permitted by statute,[3] petitioner filed a motion for new trial in the Court of Appeals. The motion was submitted on briefs without oral argument. On May 4, 1967, the following minute entry was spread on the journal of the Court of Appeals:

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[1] The court's opinion is unreported, and is reproduced in the Appendix, *infra*, p. 22. The judgment entry of the trial court appears in the Appendix, *infra*, p. 28.

[2] The judgment entry of the Court of Appeals appears in the Appendix *infra*, pp. 33-38. The temporary restraining order appears in the Appendix, *infra*, p. 22.

[3] Section 2321.19, Ohio Revised Code; Appendix, *infra*, p. 42.

"Application by plaintiff-appellant for new trial denied. Exc." [4]

On the same day, May 4, 1967, the *Daily Legal News*, the publication used by the municipal, state and federal courts situated in Cuyahoga County, published a twelve page issue containing literally thousands of notices of the filing of pleadings, motions, decisions, and schedule of hearings. The following notice appeared at page twelve in 6-point type:

"27889—The 931 East Boulevard Co., etc. vs. City of Cleveland, et al. Application by plaintiff appellant for new trial denied. Exceptions (Artl, C.J., Silbert, J., White, J., concur)."

No further notice of the court's decision was published elsewhere nor on any other date. Neither counsel for petitioner, nor petitioner, observed the single newspaper entry of the Court of Appeals' May 4th ruling on the motion for new trial. Petitioner's counsel was apprised of the decision for the first time on June 7, 1967 upon actual inspection of the appearance docket of the Court of Appeals at the courthouse. Petitioner was not apprised of the ruling on the motion for new trial, nor was it aware of the consequences of the failure to obtain notice of the ruling, until the conclusion of proceedings seeking to vacate the ruling.

By reason of the fact that § 2505.07(A) of the Ohio Revised Code provides that an appeal from the Court of Appeals to the Supreme Court of Ohio must be perfected within twenty days after the entry of an order overruling a motion for new trial, petitioner's counsel's clerical error in failing to discover the publication notice of the May 4th entry prevented petitioner from filing the necessary notice of appeal within the time permitted by statute.

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[4] Appendix, *infra*, p. 39.

Immediately following the discovery of the Court of Appeals' entry denying the motion for new trial, petitioner, by its counsel, moved the Court of Appeals to vacate its entry of May 4th or, in the alternative, to enter judgment for respondents, so as to commence anew the running of the time within which it could file a notice of appeal to the Supreme Court of Ohio. Petitioner's motion was accompanied by a supporting affidavit of its counsel asserting that neither he, nor his secretary, who had been instructed to examine the *Daily Legal News,* had discovered the publication notice of the court's ruling on the motion for new trial; that he had received no actual notification of the court's ruling from the clerk of court; and that the ruling was first noted on June 7, 1967.[5] The motion was overruled on July 20, 1967.[6]

Petitioner appealed to the Supreme Court of Ohio upon the ground, *inter alia,* that in the circumstances presented in this case the denial of petitioner's right to appeal constituted a violation of due process of law and the equal protection of the law as guaranteed to petitioner under the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Ohio dismissed the appeal[7] and denied a motion to certify.[8] It is from these orders that petitioner seeks relief by writ of certiorari to the Supreme Court of Ohio.

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[5] The affidavit appears in the Appendix, *infra,* p. 41.

[6] The order denying the motion to vacate appears in the Appendix, *infra,* p. 39.

[7] Appendix, *infra,* p. 21.

[8] Appendix, *infra,* p. 21.

REASONS FOR GRANTING THE WRIT.

I.

The denial of an appeal by reason of clerical error, mistake or neglect of counsel violates the due process and equal protection clauses of the Fourteenth Amendment, when the issue presented in such appeal is directed to the deprivation of a party's fundamental right to its property.

Petitioner's action sought to prevent the respondent City of Cleveland from proceeding with an unconstitutional appropriation of petitioner's land. Upon discovering that its counsel's failure to obtain actual notice of the court's decision would prevent it from perfecting a timely appeal [9] to the Supreme Court of Ohio to obtain review of the constitutional deficiencies inherent in the proposed taking, petitioner followed the procedure sanctioned by this Court in *Hill v. Hawes*, 320 U.S. 520 (1944), in which it was held to be "in the interest of justice to a party to the cause" [10] to vacate a decree during term so as to extend the time for appeal where the clerk had failed to give notice pursuant to rule and the party had no actual notice of the decision." [11]

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[9] In Ohio, the filing of a notice of appeal in a civil action within the time permitted by statute is the only act necessary to invoke the jurisdiction of an appellate court. Section 2505.04, Ohio Revised Code. A notice of appeal filed after the expiration of the designated time will result in dismissal of the appeal. *State ex rel. Curran v. Brookes, Jr.*, 142 Ohio St. 107, 50 N.E. 2d 995 (1943). Cf. Rule III, Section 8, of the Rules of the Supreme Court of Ohio, which provides for delayed appeals in felony cases. (25 Page's Ohio Revised Code, 1966 Supp., p. 28.)

[10] 320 U.S. at 524.

[11] The Supreme Court of Ohio had itself approved the practice of vacation of entries, upon the showing of cause, to permit an appeal. *Tims v. Holland Furnace Co.*, 152 Ohio St. 469, 90 N.E. 2d 376 (1950).

The refusal of the Court of Appeals to vacate the entry and the Ohio Supreme Court's dismissal of the appeal, presents to this Court a singular opportunity to determine whether the neglect or mistake of counsel can result in the denial of review of a party's claimed deprivation of constitutional rights in a civil proceeding. Such determination will necessarily require this Court to consider whether *procedural* due process requires that a *substantive* due process claim must be accorded review, notwithstanding the error, mistake or neglect of counsel for the party asserting the substantive right. Alternatively, this case also provides the Court with the opportunity to re-examine its decision in *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962), to determine whether it is consistent with due process for a court to foreclose, without special notice of its intention to do so, a party's right to pursue any claim or defense, whether asserting a constitutional basis or not, by reason of the error, mistake or neglect of counsel.

It cannot be denied that this Court is frequently presented with petitions for writs of certiorari in which the questions presented relate to a party's denial of a right to pursue an appeal by reason of the mistake or neglect of his counsel,[12] and has recently considered the dismissal of an appeal pending before it for counsel's failure to docket the appeal within rule.[13] The court has also had occasion to review the propriety of the dismissal of actions by district courts resulting from the neglect or dilatory conduct

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[12] See, e.g., *United States v. Robinson*, 361 U. S. 220 (1960); *Berman v. United States*, 378 U.S. 530 (1964); and *Santana v. United States*, 385 U.S. 848 (1966).

[13] *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.*, 385 U.S. 32 (1966).

of counsel.[14] In each instance, the denial of the appeal or dismissal of the action has been sustained upon the theory that the orderly administration of justice requires that there must be adherence to the rules of procedure, and that the mistake or neglect of counsel is a risk assumed by the party who retains such counsel.

The foregoing decisions, however, do not determine whether the salutary desire to achieve procedural symmetry by the adherence to mechanical rules and the preservation of the common law rule of agency must, in a given circumtsance, yield to the more compelling command of the Due Process Clause of the Fourteenth Amendment.

In *Link v. Wabash Railroad Co., supra,* a 4-3 divided court concluded that the District Court had inherent power to dismiss a long-pending action because of counsel's failure to attend a scheduled pre-trial. The majority found "no merit" to Link's contention that he was being unjustly penalized because of the dereliction of his counsel, whom he had voluntarily selected.

The Court buttressed its conclusion by attributing counsel's inaction to his client as a result of "inferences of conscious acquiescence" [15] demonstrating waiver by the client. But any finding of waiver, whether express or implied, by counsel or party, must reckon with the "presumption against the waiver of fundamental rights," *Glasser v. United States,* 315 U. S. 60, 70 (1942), and may be found only upon a showing of "an intentional relinquishment or abandonment of a known right or privi-

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[14] *Link v. Wabash Railroad Co.,* 370 U.S. 626 (1962) and *Beaufort Concrete Co. v. Atlantic States Construction Co.,* 384 U.S. 1004 (1966).

[15] 370 U.S. at 634, fn. 10.

lege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Even an attempted express waiver by counsel will not be sustained unless the standard established in *Johnson v. Zerbst* has been met. *Brookhart v. Janis*, 384 U.S. 1 (1966). But for those cases which base implied waiver by counsel upon the assumption that the failure to invoke the constitutional right was a deliberate act by counsel, founded upon trial strategy or some other reason, cf. *Diaz v. United States*, 223 U.S. 442 (1911), this Court has been most reluctant to find implied waived of federal constitutional rights from the conduct or abstentions of counsel.[16]

In the case at bar, petitioner could realize no benefit whatever from its counsel's failure to note the publication of the court's entry denying the motion for new trial. Thus, the record contains nothing to support any inference of waiver. Moreover, it is beyond reason to infer that there has been a *conscious* waiver when neither the party nor counsel had actual notice of the event deemed to have resulted in the waiver. This Court has held that "[p]resuming waiver from a silent record is impermissible." [17] Petitioner contends, therefore, that the rule of waiver of constitutional rights by inference of conscious acquiescence cannot be applied here.

In further support of its rejection of petitioner's claim of unjust penalty, the majority in *Link v. Wabash Railroad Co., supra*, noted:

"And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the

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[16] Even failure to invoke constitutional protections by deliberate tactical strategy of counsel, *without prior consultation with his client*, may not be sufficient waiver to insulate against review on the merits of the constitutional claim. See *Henry v. Mississippi*, 379 U.S. 443 (1965) and *Whitus v. Balkom*, 333 F. 2d 496 (5th Cir., 1964).

[17] *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

client's remedy is against the attorney in a suit for malpractice." [18]

It is true that if Link's counsel was culpable of professional neglect, Link could have recovered his railroad-inflicted damages from his counsel. But what if Link had been petitioner in this action? How could he recover his land which had been unconstitutionally taken from him? It is clear that no malpractice action against his counsel could restore his title to the real estate, nor litigate his constitutional claims. In short, a person who seeks to protect his property from an unconstitutional taking has no remedy at law against his counsel for having frustrated the opportunity to obtain judicial review of the asserted constitutional infringement.

Thus, the majority's position in *Link*, that a client is not unjustly penalized by counsel's mistake or neglect, must be found to be inapplicable in circumstances where the mistake or neglect has an irrevocable bearing on the implementation of fundamental rights.

Petitioner has demonstrated above that the rationale of the *Link* decision will not, upon analysis, sustain the denial of petitioner's appeal under the circumstances here presented, for which reason the rule of *Link* must be limited to its facts, and not applied to circumstances where, as in the instant case, fundamental constitutional claims form the basis of the cause of action lost.

In *Societe Internationale Pour Participations Industrielles Et Commercials, S. A. v. Rogers*, 357 U.S. 197 (1958), this Court recognized the necessity for a limitation on the inherent power of a court, or a court which is acting in aid of its own valid rules, to dismiss an action for a party's failure to comply with a pre-trial discovery order,

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[18] 370 U.S. at 634, fn. 10.

although not as a consequence of dereliction of counsel. However, in *Rogers*, as in the instant case, the constitutional right to substantive due process in the deprivation of property was the basis for the limitation. In that case, petitioner was attempting to recover its property which had been seized under the Trading With the Enemy Act. When petitioner failed to produce records pursuant to order of court, the District Court dismissed the action notwithstanding petitioner's claim that its failure to produce the records was not occasioned by refusal, but rather because it was prevented from doing so by virtue of Swiss law. This Court reversed the dismissal of the action upon a determination that petitioner was without fault in the circumstances presented in the case, and that "substantial constitutional questions" [19] were necessarily "provoked" [20] by the dismissal.

In reaching its decision in *Rogers*, the Court distinguished *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), in which a presumption of an invalid defense was said to have arisen on defendant's failure to produce, and concluded that such a presumption was not applicable when the record demonstrated that the *petitioner was without fault* and *constitutional rights in property were in issue*. The court stated:

> "Certainly substantial constitutional questions are provoked. Their gravity is accented in the present case where petitioner, though cast in the role of *plaintiff*, cannot be deemed to be in the customary role of a party invoking the aid of a court to vindicate rights asserted against another. Rather petitioner's position is more analogous to that of a *defendant* for it belatedly challenges the Government's action by now

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[19] 357 U.S. at 210.

[20] *Id.*

> protesting against a seizure and seeking the recovery of assets * * *. [T]*his summary power to seize property* which is believed to be enemy-owned *is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure.*"[21] (Emphasis added.)

Petitioner in the case at bar is cast in the identical role. As a defendant in the appropriation proceeding, it is attempting by collateral action to prevent the unlawful seizure of its property. The Due Process Clause of the Fourteenth Amendment, just as the parallel provision of the Fifth Amendment, guarantees petitioner the right to a "judicial hearing as to the propriety of the seizure." The same due process clause, in its procedural context, guarantees that the judicial hearing so accorded petitioner shall not be impaired by an unauthorized act or omission of counsel which results in the nullification of substantive rights.

Finally, it should be noted that although a State is not compelled by the federal constitution to provide petitioner with the right of appeal, *McKane v. Durston*, 153 U.S. 684 (1894), when the State establishes an appellate procedure, the due process and equal protection clauses of the Fourteenth Amendment are operative "at all stages of the proceedings," *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), including the court from which appellate relief is sought, *Draper v. Washington*, 372 U.S. 487 (1963). Any procedure which results in the denial of the appeal must be found to have satisfied the same due process and equal protection safeguards which attended the trial.

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[21] 357 U.S. at 210-211.

It is of no avail for respondents to argue that the appeal which petitioner would have perfected to the Supreme Court of Ohio might have been denied by that court in the exercise of its discretion. For this Court has long since determined in *Burns v. Ohio*, 360 U.S. 252 (1959), that State action which prevents a party from invoking the jurisdiction of an appellate court, even for the purpose of exercising its discretion to accept the appeal, constitutes a violation of due process and equal protection of the law.

II.

Publication notice of a court's decision pursuant to rule fails to comply with the due process requirements of the Fourteenth Amendment, where the name and address of counsel and the interested party who is seeking to enjoin an unconstitutional appropriation proceeding are known to the court rendering the decision.

Petitioner filed its motion for new trial in the Court of Appeals on February 10, 1967. The motion was submitted on briefs, without oral argument. Almost three months later, on May 4, 1967, the Court of Appeals denied the motion. Service of notice of the decision was attempted pursuant to rule VIII of the Rules of the Courts of Appeals of Ohio, which provides in pertinent part:[22]

> "At such time as a decision is announced, notice thereof shall be given by mail to counsel of record in the case or *by publication once in a newspaper published each court day of the week in which the assignment of cases for trial and decisions of courts of record in the county are regularly published,* if there be such a publication." (Emphasis supplied.)

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[22] The complete statement of Rule VIII is printed in the Appendix, *infra*, pp. 39-40.

The rule provides alternative means of giving notice of a decision, i.e., by mail or publication. In the case at bar, the court elected to act under the publication provision of the rule and caused the entry to be inserted in the May 4, 1967 issue of the *Daily Legal News,* which printed the following notice in 6-point type on page 12 of the newspaper:

> "27889—The 931 East Boulevard Co., etc. v. City of Cleveland, et al. Application by plaintiff appellant for new trial denied. Exceptions (Artl., C.J., Silbert, J., White, concur.)" [23]

Although petitioner's counsel was aware of the practice of publication of notice of decisions, and had instructed his secretary to read the *Daily Legal News,* the notice, nevertheless, was not brought to his attention. Neither counsel, nor petitioner obtained actual notice of the decision until after the time for appeal had expired.[24]

The question thus presented in this petition is whether under the circumstances here existing the court's publication notice of its decision pursuant to its rule meets the minimum standards of due process required by the Fourteenth Amendment. In deciding this issue, it is unnecessary to determine that Rule VIII of the Court of Appeals is unconstitutional *per se,* but rather that in the application of the rule the petitioner has been denied due process,[25] for petitioner concedes that there may be instances in which publication notice of a decision would be permissible, as, for example, when a party's whereabouts are unknown.

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[23] The full page of the publication, in exact size, is reproduced in the Appendix, *infra,* at p. 44.

[24] See Affidavit of counsel in support of motion to vacate, appendix, *infra,* p. 41.

[25] Cf. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886).

In this case, however, the petitioner was present in Cuyahoga County at the time the decision was announced. Its address was on record with the court. The court recognized that petitioner was deeply committed to challenging the attempted unconstitutional deprivation of its property. The court was aware of petitioner's right to appeal the decision and reserved "exceptions" to petitioner in the entry for that purpose. Notwithstanding these facts, acting under its alternative rule,[26] the court published notice of its decision. Petitioner contends that publication notice under such circumstances constituted a denial of due process of law.

In *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), Justice Jackson remarked that notwithstanding the many disagreements as to the meaning of the words of the due process clause, "there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." [27]

Throughout the history of this Court, great care has been given to protect this fundamental right to notice. The evolvement of statutory schemes for notice by publication have been sanctioned only because they were in aid of perfecting jurisdiction in cases in which the State would otherwise be unable to adjudicate rights in property or other interests which were found to be properly within its concerns. Apart from such purpose, there can

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[26] Although not pertinent to the issues presented in this petition, there is serious doubt that the rule's provision for publication notice is valid, by reason of Section 2701.09, Ohio Revised Code, which expressly excepts courts of appeals from those courts which are authorized to publish notices. In view of the denial of the motion to certify by the Supreme Court of Ohio, the validity of the rule was not considered by that court.

[27] 339 U.S. at 313.

be no justification for resort to the device of publication notice. The publication notice issued by the Court of Appeals certainly was not in furtherance of its jurisdiction. Indeed, petitioner had invoked the jurisdiction of that court.

The purpose of the notice was to apprise petitioner that its rights had been adjudicated and that the time for appeal had commenced. Such notice, so far as the recipient is concerned, is no less imperative than the notice which issues at the commencement of an action, for in each instance substantive rights are placed in jeopardy. Due process requires that such rights shall not be extinguished without an adequate notice presenting an opportunity to be heard. The court's published notice failed to satisfy this requirement.

The Court has recognized that it is unrealistic to believe that publication notice will result in the parties' receiving actual notice. "In too many instances notice by publication is no notice at all." [28] Publication service has been found to be consistent with due process only by reason of necessity arising from difficulty or impossibility to perfect service in some other manner. And when such form of notice is resorted to, the necessity for publication and the procedure employed must stand the test of reasonableness. Thus, even in those factual situations in which service by publication is authorized in Ohio, when the name and address of the party who is sought to be served by publication are known, the statutes invariably require that notice by mail be given in addition to the publication.[29]

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[28] *Walker v. City of Hutchinson*, 362 U.S. 112, 117 (1956).

[29] See, *e.g.* Section 2703.16, Ohio Revised Code (general provisions); Section 163.07, Ohio Revised Code (appropriation of property); Section 3105.06, Ohio Revised Code (divorce and

(Continued on following page)

In *Mullane v. Central Hanover Bank and Trust Co., supra,* this Court stated that when the process to which a person is entitled "is a mere gesture [it] is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." [30] In invalidating the statutory scheme for publication notice to those persons whose names and addresses were known, this Court in *Mullane* concluded:

> "The statutory notice to known beneficiaries is inadequate not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication." [31]

In the instant case, if the Court of Appeals had given no notice whatever of its adverse ruling until the time for appeal had expired, no one could deny that petitioner had been deprived of due process of law. Burial of the notice in a daily 12-page legal publication amidst thousands of similar entries serves no more useful constitutional purpose, particularly where alternate means of more direct notice, i.e., mail or telephone call, could easily be provided by the court. For when notice is required to be given a party, it must be of a nature reasonably calculated to provide *actual* notice to him. *Covey v. Sommers,* 351 U.S. 141 (1956), and *Mullane v. Central Hanover Bank and Trust Co., supra.*

(Continued from preceding page)

alimony); Section 1703.19, Ohio Revised Code (foreign corporations); and Section 2703.20, Ohio Revised Code (nonresident motor vehicle operators).

[30] 339 U.S. at 315.

[31] 339 U.S. at 319.

The *Mullane* decision was thereafter held to be expressly applicable to vitiate condemnation proceedings in which governmental agencies issued notice by publication to residents whose names and addresses were of record. *Walker v. City of Hutchinson*, 352 U.S. 112 (1956) and *Schroeder v. City of New York*, 371 U.S. 208 (1962). In each case the Court observed that due process could have been satisfied by the simple expedient of a direct mailing. Justice Stewart noted in *Schroeder:*

> "The general rule that emerges from the Mullane case is that *notice by publication is not enough with respect to a person whose name and address are known* or very easily ascertainable *and whose legally protected interests are directly affected by the procedures in question.*" (Emphasis supplied.)[32]

In obvious recognition of the principles discussed here respecting the constitutional necessity for notice, this Court[33] and the Supreme Court of Ohio, notify counsel directly of every interim and final action taken in each case on their dockets. This procedure obtains notwithstanding that their decisions and rulings are publicized, often in more than one publication. No reasonable explanation can be offered to explain the Cuyahoga County Court of Appeals' failure to do so as well. The constitutional command for due process cannot be rebutted, nor will it be rebuffed.

CONCLUSION.

Unless relief is granted by this Court, petitioner will have been deprived of an important right to test the unconstitutional condemnation of its real estate by all the appellate means which other citizens of the State of Ohio

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[32] 371 U.S. at 212.

[33] See also, Rule 25, Rules of the Supreme Court.

enjoy. And it will have been deprived of such right solely because of its counsel's clerical failure to pick an entry from the myriad entries appearing daily in a legal publication, a process over which petitioner had no control whatever. This petition presents this Court with an opportunity to declare that constitutional rights cannot be so easily destroyed.

For the foregoing reasons, petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

BERNARD A. BERKMAN,
LARRY S. GORDON,
JOSHUA J. KANCELBAUM,
GERALD A. MESSERMAN,
Counsel for Petitioner.

APPENDIX.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING.

[Entered December 20, 1967.]

It is ordered by the court that rehearing in this case is denied.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY.

[Entered December 6, 1967.]

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL.

[Entered December 6, 1967.]

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS ON MOTION FOR TEMPORARY RESTRAINING ORDER.

This cause came on for hearing on this 8th day of September, 1965 before the Honorable William K. Thomas presiding in Courtroom Number One upon a Motion for Temporary Restraining Order.

The Court finds that the defendant, the City of Cleveland, has been duly served with notice of this hearing; is duly represented at this hearing by counsel; and that the Motion is well taken and should be granted.

It is, Therefore, Ordered, Adjudged and Decreed that the Application to Assess Compensation pending in this Court as Case No. 788,900 be held in abeyance and not be brought to trial until this case (No. 790,231) has been tried, appealed if necessary and appropriate, and finally disposed of.

WILLIAM K. THOMAS,
Judge.

OPINION OF THE COURT OF COMMON PLEAS.

McNEILL, J. (By Assignment)

This cause came on to be heard upon three causes of action to enjoin the defendants. A fourth cause of action for damages, by consent, was not submitted herein.

1. The City of Cleveland, a Charter City, has commenced action to appropriate lands of Plaintiff. The City also has advertised for sale of lands on 82nd Street.

2. Rockfeller Park was created by John D. Rockefeller. He either gave land to the City for parks, reimbursed the City for land already acquired, or gave money

to acquire land. It was created by one instrument and provided a forfeiture of said lands, both those given and those obtained with money either furnished or reimbursed.

3. The tract on 82nd Street contains some lots given to, and some acquired by the City for which they were reimbursed.

4. Prior to any issue herein, City officials had developed an interest in plaintiff's tract as being suitable for park purposes, and had determined that the tract on 82nd Street was not suitable for park purposes. Because of the limitation in the grant, the City was unable to sell the 82nd Street property.

5. In years past, the original grantor, John D. Rockefeller, Rockefeller heirs, and Rockefeller Brothers, Inc., had permitted certain sales and engrafted conditions on some sales.

6. The 82nd Street property because of its location and terrain has never been integrated into Rockefeller Park. It is higher than the rest of the park and has a one to one slope connecting it with the rest. Unauthorized persons have used it to dump rubbish and debris on it. All houses have disappeared from 82nd Street.

7. Because of #6 above, employees of the defendant companies began parking cars on 82nd Street property during the war years. The City was then notified by the Rockefeller heirs that all parking would have to cease on the 82nd Street property, or they would enforce the right of re-entry. The parking was not done by the companies, but sprang up like "Topsy" during the wartime by individual employees of the companies.

8. Thereafter, for various reasons, the holders of the reversion stayed their hands for a period of time, and then agreed that as a general policy, the City could sell parts

of Rockefeller Park deemed unsuitable, if they replaced it with an equal number of acres of suitable land, and if there was any profit, it should be invested in the park. It was their idea not to control the City in its use, but that Mr. Rockefeller had left a certain number of acres for park use, and desired to keep the given acreage intact, although there may be shifts in the exact acreage from time to time. Rockefeller Brothers, Inc., would release their reversionary interest to any purchaser.

9. The companies, in an effort to solve the problem, offered to bid at least an amount for the tract as if appraised industrial. Neither Rockefeller Brothers, Inc., nor the companies did any of the selection of plaintiff's property as a replacement. That was done by the City.

10. The 82nd Street property is not, and never has been suitable. This testimony is undisputed.

11. Plaintiff's land is suited for park purposes by its natural terrain and location. The park has other individual parks across the road from the main part of the park. Because of its location to a school, a home for the elderly, and other features, it is attractive for park purposes.

12. The City already has a problem keeping fire lanes open and preventing the parking of cars in restricted parking zones. If 500 to 600 cars are added to the streets, these problems will increase and hazardous conditions result.

13. The Companies have purchased lands for parking whenever possible. However, available land will not absorb the improper parking by employees on 82nd Street. Without parking, their expansion will be limited.

Has the City lost Rockefeller Park because of the unauthorized parking of vehicles as claimed by the plaintiff?

The Court feels the answer is no. To so hold would be holding this is a fee simple determinable. This would be contra to the facts in this case.

1. No reversionary interest is created in all the park land. A reversionary interest can be created only by deed or will. The forfeiture of land not directly given, but only indirectly, can only be enforced as a contract. It would be quite inconsistent to hold part of the land automatically reverts, but the Rockefeller survivors must take action on other land. Thus, it is apparent that on deeded land, a fee simple, subject to a condition subsequent, was created, necessitating some action by the Rockefeller interests on any and all lands before there is a forfeiture.

2. The actions of the parties, including Mr. Rockefeller, have treated this as a fee simple subject to a condition subsequent. This is given great weight in determining the meaning of the parties. *Courtright v. Schrimger et al.*, 110 O. S. 547; *Condon v. Contracting Co.*, 122 O. S. 100.

3. *Ink v. City of Canton*, 4 O. S. 2d 51, is not determinative. The nature of the reversion was not an issue. In that case the holders of the reversionary interest claimed a breach of conditions and brought action, which would terminate either type of interest. This was resisted by those representing the public. Here, uniquely, we have a member of the public claiming a reversion and those holding the reversionary interest denying it.

4. If Plaintiff were correct, it would not aid him. The sale would be enjoined, but loss of part or all of the park lands would be sufficient reason for the city to look for new park lands.

Is the action by the City of Cleveland in selling one tract and condemning plaintiff's land unreasonable or arbitrary? The Court feels that it is not.

1. A Charter City may sell any property they deem no longer needed for municipal purposes. This is conferred by the Constitution. *Babin v. City of Ashland,* 160 O. S. 328. In this case the holder of the reversion is joining in the sale so the possibility of a reversion is not an issue.

2. The undisputed fact that the 82nd Street land never has been, nor is it now suitable for park purposes, and the plaintiff's property is, is dispositive of this matter. If there were no restrictions on the City, the fact that they seek to sell an undesirable parcel of park land and add a desirable one in its place certainly would not be unreasonable or arbitrary. The nature of the instruments in this case cannot change this fact. Unless the actions of Council are unreasonable or arbitrary, a court will not put its judgment in place of that of council.

3. It is true Plaintiff will lose his property and the defendant companies may gain a property. This does not make the action illegal. In urban renewal a private interest gains the identical property. The State has condemned a means of egress and given it to one whose egress was eliminated. The mere fact that an individual may gain a desired property is immaterial if a primary public interest is accomplished.

4. Within the terms of *Babin v. Ashland, supra,* the public will be benefited. A piece of ground unsuitable for parks or other municipal purposes will be disposed of. The park will remain the same size with a piece of suitable ground added. Any gain will be reinvested in the park. In addition, there are other benefits. Hazardous traffic and emergency equipment situations will be prevented. Industry will be allowed to grow, which will promote the general health of the City as well as enhance its tax duplicate. This is a public interest. *State ex rel. v. Redick,* 168

O. S. 543; (particularly note the Court's quoting with approval, *Hugger v. City of Ironton,* 83 O. A. 21, at pp. 546 & 547.) The public will receive only benefits. The fact incidentally that the companies may also gain is immaterial. The only one that may lose is the defendant. His loss will be in property that he does not wish to sell, but for which he will be compensated. This is the situation in most appropriations.

Thus, there can be no conspiracy. There can be no conspiracy to do a legal act. *Nesmith v. The State of Ohio,* 101 O. S. 158; *Napier v. Graw,* 156 F. Supp. 30. No basis for conspiracy exists. Several defendants have different desires. Some overlap, but their interests and desires are not identical. The insistence of Rockfeller Brothers, Inc., that if the City sells property they must replace it is legal. Their reversionary interest has value. *Ink v. Canton, supra.* They do not care if the City sells or not, but if they do sell, they have set the consideration for their reversion.

The companies want to buy, but do not care if the City replaces any property. The City would like to dispose of unsuitable property, but finds they must replace it if they do. Rockefeller Brothers, Inc. and the companies do not care what land is substituted. This was done by the City determining to secure land they have long deemed suitable. This is not a conspiracy against plaintiff.

The Court has not listed citations in detail. The briefs are full of citations applicable and unapplicable. Counsel are aware of all citations applicable to the Court's opinion.

A Journal Entry may be prepared in accordance herewith.

Dated February 3, 1966.

EUGENE R. MCNEILL,
Judge (By Assignment).

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS.

(Civ. Jour. 12, p. 388.)

This 23rd day of February, 1966, the Court, having heretofore heard this action upon the first, third and fourth causes of action of the plaintiff's Second Amended Petition (the parties having stipulated that the second cause of action would be reserved for later determination) and upon the answers of the defendants thereto and upon the evidence, and having considered briefs filed by counsel herein, hereby finds for the defendants and each of them upon the issues set forth in the first, third and fourth causes of action of the plaintiff's Second Amended Petition, and further finds as follows:

The plaintiff's property referred to in its Second Amended Petition (hereinafter referred to as the "931 East Boulevard parcel") is suitable for public park purposes by reason of its natural terrain and location. The City of Cleveland, for many years prior to the time when the controversies involved in the present suit arose, had regarded said parcel as a desirable addition to its park system.

The proceeding (No. 788,900 on the docket of this Court), heretofore filed by the City of Cleveland against 931 East Boulevard Company to assess compensation for the taking for park purposes by condemnation of the 931 East Boulevard parcel, being the proceeding which the plaintiff seeks to enjoin the defendant, the City of Cleveland, from prosecuting, was duly authorized by Resolution No. 1964-61 and Ordinance No. 2216-62 which were duly adopted by the Council of the City of Cleveland. There was no fraud, abuse of discretion, bad faith or collusion in the adoption of said Resolution and said Ordinance by the Council of the City of Cleveland. The filing and prosecution of said proceeding are in conformity with the laws of the State of Ohio and the Charter of the City of

Cleveland. The purpose of the taking of said 931 East Boulevard parcel by said condemnation proceeding for a public park use is a public purpose and not a private purpose.

The City of Cleveland is the owner of certain land known as Rockefeller Park, the property originally comprised in which is described in a deed from John D. Rockefeller and Laura C. Rockefeller to the City of Cleveland, dated April 5, 1897, and recorded in Volume 660, pages 288 to 321, inclusive of Cuyahoga County Records (hereinafter referred to as the "Rockefeller deed").

By the terms of the Rockefeller deed and as shown by the construction placed upon it by the parties to said deed, the grantor conveyed the first twenty-five parcels therein described to the City in fee simple subject to a condition subsequent, the grantor reserving to himself and his heirs a right of entry in the event of a breach. The other sixty-one parcels described in the Rockefeller deed, for the acquisition of which the City was reimbursed by the grantor, are not subject to such reserved right of entry but are subject to the covenants and conditions set forth in said deed which can be enforced by appropriate action. The Rockefeller deed did not create in the City a determinable fee in any of said parcels.

At the request of the City of Cleveland, the City and Rockefeller Brothers Fund, Inc., a New York charitable corporation, entered into an agreement dated November 20, 1958, after the conveyance to Rockefeller Brothers Fund, Inc., by the heirs of John D. Rockefeller therein named, of all of their reversionary and other rights in the aforesaid premises. That agreement, a copy of which is set forth in full in the deed from Rockefeller Brothers Fund, Inc., to the City of Cleveland, recorded in Volume 9462, pages 9-22, both inclusive, of Cuyahoga County Rec-

ords, is valid and binding on the parties thereto and their successors. Under that agreement Rockefeller Brothers Fund, Inc., is the owner of all of the revisionary and other rights in the aforesaid premises of all of those heirs of John D. Rockefeller who have conveyed or who may hereafter convey their reversionary and other rights to it.

A portion of the land described in the Rockefeller deed, consisting of a 3.65 acre parcel of land, located on East 82nd Street (hereinafter referred to as the "East 82nd Street parcel"), consisted of sublots Nos. 106 to 131, inclusive, and the southerly one-half of sublot No. 132 in the R. N. Denham Subdivision. Sublots Nos. 129, 130, 131 and the southerly one-half of sublot No. 132 had been owned by John D. Rockefeller and were conveyed to the City of Cleveland by the Rockefeller deed, and sublots 106 to 128, inclusive, had been previously acquired by the City, and the grantor either paid the purchase price thereof or reimbursed the City for such purchase price.

Said East 82nd Street parcel is located on a level approximately 25 feet higher than the rest of the park property, and is separated therefrom by a steep embankment. The parcel is 1060 feet long and only 150 feet wide. The properties on East 82nd Street in the vicinity of said parcel are industrial properties. The East 82nd Street parcel has never been developed as a part of Rockefeller Park, and the undisputed testimony is that, by reason of its size, shape, location and topography, said parcel is not and never has been suitable for park purposes. It has for many years been used by employees of the defendants, White Motor Corporation, Park Drop Forge Company and Eaton Manufacturing Company and its predecessor, Dill Manufacturing Company, for the parking of cars. Said corporate defendants desire to acquire title to said East 82nd Street parcel so that it can continue to be used by

their employees for parking purposes and have offered to bid for said parcel; if it is offered for sale, a sum not less than $123,000.00, being the value of said East 82nd Street parcel for parking or industrial purposes as determined by an independent appraisal.

By reason of the provisions of the agreement, dated November 20, 1958, between Rockefeller Brothers Fund, Inc. and the City of Cleveland, the City cannot lawfully sell said East 82nd Street parcel or permit the use thereof for purposes other than for public park or park driveway purposes without the approval or consent of Rockefeller Brothers Fund, Inc. Said Rockefeller Brothers Fund, Inc. was not willing to consent to the sale of said East 82nd Street parcel unless the City of Cleveland should first acquire for park purposes other suitable land having an area approximately equal to the area of East 82nd Street parcel. The 931 East Boulevard parcel has an area approximately equal to that of the East 82nd Street parcel. The City recommended the 931 East Boulevard parcel as a suitable replacement parcel, and, in reliance upon the City's recommendation, Rockefeller Brothers Fund, Inc. expressed its willingness to approve said 931 East Boulevard parcel as a suitable replacement for the East 82nd Street parcel and to consent to the sale of said East 82nd Street parcel if the City shall first acquire for park purposes said 931 East Boulevard parcel, and shall restrict the use of the East 82nd Street parcel to parking for a period of twenty-five years, and will devote to park purposes the excess, if any, of the selling price of the East 82nd Street parcel over the cost to the City of the 931 East Boulevard parcel. Ordinance No. 2110-61, duly adopted by the Council of the City of Cleveland, contains a declaration that said East 82nd Street parcel is no longer needed for municipal purposes and authorizes a public sale there-

of, subject to approval by Rockefeller Brothers Fund, Inc. There was no fraud, abuse of discretion, bad faith or collusion in the adoption of said Ordinance by the Council of the City of Cleveland.

The condemnation of the 931 East Boulevard parcel, and the sale of said East 82nd Street parcel are authorized by the laws of Ohio and by the Charter of the City of Cleveland. The Condemnation of said 931 East Boulevard parcel and the sale of said East 82nd Street parcel, as provided in the resolution and ordinances hereinabove referred to, are legal and proper, and no rights of the plaintiff under the Fifth or Fourteenth Amendments to the Constitution of the United States or under Section 16 or 19 of Article I, or under Section 3 or Section 10 of Article XVIII of the Constitution of the State of Ohio have been or will be violated by such condemnation of said 931 East Boulevard parcel or by such sale of said East 82nd Street parcel.

The defendants have not been guilty of, and have not engaged in, any unlawful conspiracy, since neither the condemnation by the City of Cleveland of said 931 East Boulevard parcel nor the sale by said City of said East 82nd Street parcel, involve any unlawful object or purpose, and since the means and procedures by which such condemnation and such sale are to be effected are lawful and proper.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the injunction prayed for in the first, third and fourth causes of action of plaintiff's Second Amended Petition be and hereby is denied, that judgment be and hereby is rendered in favor of the defendants and each of them upon said first, third and fourth causes of action, and that the defendants recover from the plaintiff their costs herein expended. The plaintiff's exceptions are hereby noted.

JOURNAL ENTRIES IN THE COURT OF APPEALS.

April 13, 1966.

Case retained on law and fact. Parties by notice to designate parts of the record made in trial court upon which they will present their case in this Court.

JUDGE J. J. P. CORRIGAN, *Presiding Judge*
Journal 30, page 328

January 31, 1967.

This case, being before this Court on appeal on questions of law and fact filed by the plaintiff-appellant, The 931 East Boulevard Company (hereinafter referred to as the "plaintiff"), came on for hearing upon the plaintiff's Second Amended Petition, and upon the answers thereto of the defendants-appellees (hereinafter referred to as the "defendants"), and upon the evidence, including the transcript of testimony taken and the exhibits introduced in evidence in the court below, and was argued orally and on briefs; and, upon consideration thereof, the court hereby finds for the defendants, and each of them, upon the issues joined, and further finds as follows:

The plaintiff's property referred to in its Second Amended Petition (hereinafter referred to as the "931 East Boulevard parcel") is suitable for public park purposes by reason of its natural terrain and location. The City of Cleveland, for many years prior to the time when the controversies involved in the present suit arose, had regarded said parcel as a desirable addition to its park system.

The proceeding, (No. 788,900 on the docket of the Court of Common Pleas), heretofore filed by the City of Cleveland against The 931 East Boulevard Company to assess compensation for the taking for park purposes by

condemnation of the 931 East Boulevard parcel, being the proceeding which the plaintiff seeks to enjoin the defendant, the City of Cleveland, from prosecuting, was duly authorized by Resolution No. 1964-61 and Ordinance No. 2216-62 which were duly adopted by the Council of the City of Cleveland. There was no fraud, abuse of discretion, bad faith or collusion in the adoption of said Resolution and said Ordinance by the Council of the City of Cleveland. The filing and prosecution of said proceeding are in conformity with the laws of the State of Ohio and the Charter of the City of Cleveland. The purpose of the taking of said 931 East Boulevard parcel by said condemnation proceeding for a public park use is a public purpose and not a private purpose.

The City of Cleveland is the owner of certain land known as Rockefeller Park, the property originally comprised in which is described in a deed from John D. Rockefeller and Laura C. Rockefeller to the City of Cleveland, dated April 5, 1897, and recorded in Volume 660, pages 288 to 321, inclusive, of Cuyahoga County Records (hereinafter referred to as the "Rockefeller deed").

By the terms of the Rockefeller deed and as shown by the construction placed upon it by the parties to said deed, the grantor conveyed the first twenty-five parcels therein described to the City in fee simple subject to a condition subsequent, the grantor reserving to himself and his heirs a right of entry in the event of a breach. The other sixty-one parcels described in the Rockefeller deed, for the acquisition of which the City was reimbursed by the grantor, are not subject to such reserved right of entry but are subject to the covenants and conditions set forth in said deed which can be enforced by appropriate action. The Rockefeller deed did not create in the City a determinable fee in any of said parcels.

At the request of the City of Cleveland, the City and Rockefeller Brothers Fund, Inc., a New York charitable corporation, entered into an agreement dated November 20, 1958, after the conveyance to Rockefeller Brothers Fund, Inc., by the heirs of John D. Rockefeller therein named, of all of their reversionary and other rights in the aforesaid premises. That agreement, a copy of which is set forth in full in the deed from Rockefeller Brothers Fund, Inc., to the City of Cleveland, recorded in Volume 9462, pages 9-22, both inclusive, of Cuyahoga County Records, is valid and binding on the parties thereto and their successors. Under that agreement Rockefeller Brothers Fund, Inc., is the owner of all of the reversionary and other rights in the aforesaid premises of all of those heirs of John D. Rockefeller who have conveyed or who may hereafter convey their reversionary and other rights to it.

A portion of the land described in the Rockefeller deed, consisting of a 3.65 acre parcel of land, located on East 82nd Street, (hereinafter referred to as the "East 82nd Street parcel") consisted of sublots Nos. 106 to 131, inclusive, and the southerly one-half of sublot No. 132 in the R. N. Denham Subdivision. Sublots Nos. 129, 130, 131 and the southerly one-half of sublot No. 132 had been owned by John D. Rockefeller and were conveyed to the City of Cleveland by the Rockefeller deed, and sublots 106 to 128, inclusive, had been previously acquired by the City, and the grantor either paid the purchase price thereof or reimbursed the City for such purchase price.

Said East 82nd Street parcel is located on a level approximately 25 feet higher than the rest of the park property, and is separated therefrom by a steep embankment. The parcel is 1060 feet long and only 150 feet wide. The properties on East 82nd Street in the vicinity of said parcel are industrial properties. The East 82nd Street parcel has

never been developed as a part of Rockefeller Park, and the undisputed testimony is that, by reason of its size, shape, location and topography, said parcel is not and never has been suitable for park purposes. It has for many years been used by employees of the defendants, White Motor Corporation, Park Drop Forge Company and Eaton Manufacturing Company and its predecessor, Dill Manufacturing Company, for the parking of cars. Said corporate defendants desire to acquire title to said East 82nd Street parcel so that it can continue to be used by their employees for parking purposes and have offered to bid for said parcel, if it is offered for sale, a sum not less than $123,000.00, being the value of said East 82nd Street parcel for parking or industrial purposes as determined by an independent appraisal.

By reason of the provisions of the agreement, dated November 20, 1958, between Rockefeller Brothers Fund, Inc. and the City of Cleveland, the City cannot lawfully sell said East 82nd Street parcel or permit the use thereof for purposes other than for public park or park driveway purposes without the approval or consent of Rockefeller Brothers Fund, Inc. Said Rockefeller Brothers Fund, Inc. was not willing to consent to the sale of said East 82nd Street parcel unless the City of Cleveland should first acquire for park purposes other suitable land having an area approximately equal to the area of East 82nd Street parcel. The 931 East Boulevard parcel has an area approximately equal to that of the East 82nd Street parcel. The City recommended the 931 East Boulevard parcel as a suitable replacement parcel, and, in reliance upon the City's recommendation, Rockefeller Brothers Fund, Inc. expressed its willingness to approve said 931 East Boulevard parcel as a suitable replacement for the East 82nd Street parcel and to consent to the sale of said East 82nd

Street parcel if the City shall first acquire for park purposes said 931 East Boulevard parcel, and shall restrict the use of the East 82nd Street parcel to parking for a period of twenty-five years, and will devote to park purposes the excess, if any, of the selling price of the East 82nd Street parcel over the cost to the City of the 931 East Boulevard parcel. Ordinance No. 2110-61, duly adopted by the Council of the City of Cleveland, contains a declaration that said East 82nd Street parcel is no longer needed for municipal purposes and authorizes a public sale thereof, subject to approval by Rockefeller Brothers Fund, Inc. There was no fraud, abuse of discretion, bad faith or collusion in the adoption of said Ordinance by the Council of the City of Cleveland.

The condemnation of the 931 East Boulevard parcel, and the sale of said East 82nd Street parcel are authorized by the laws of Ohio and by the Charter of the City of Cleveland. The condemnation of said 931 East Boulevard parcel and the sale of said East 82nd Street parcel, as provided in the resolution and ordinances hereinabove referred to, are legal and proper, and no rights of the plaintiff under the Fifth or Fourteenth Amendments to the Constitution of the United States or under Section 16 or 19 of Article I, or under Section 3 or Section 10 of Article XVIII of the Constitution of the State of Ohio have been or will be violated by such condemnation of said 931 East Boulevard parcel or by such sale of said East 82nd Street parcel.

The defendants have not been guilty of, and have not engaged in, any unlawful conspiracy, since neither the condemnation by the City of Cleveland of said 931 East Boulevard parcel nor the sale by said City of said East 82nd Street parcel, involve any unlawful object or purpose, and since the means and procedures by which such

condemnation and such sale are to be effected are lawful and proper.

The findings and determinations hereinabove made with respect to the issues relating to injunction are determinative of lack of merit of the claim for damages contained in the second cause of action of plaintiff's Second Amended Petition.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff's Second Amended Petition be and is hereby denied; that judgment be and hereby is rendered in favor of the defendants, and each of them, upon the first, second, third and fourth causes of action of plaintiff's Second Amended Petition; and that the defendants recover from the plaintiff their costs expended in this Court and in the Court below.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the order of the Court of Common Pleas, entered on October 1, 1965, directing that the said condemnation proceeding (No. 788,900 on the Docket of the Court of Common Pleas) be held in abeyance during the pendency of the trial in the Court below and of any appeal, be and it is hereby vacated.

The plaintiff's exceptions are hereby noted.

JOSEPH A. ARTL, *Judge*
Journal 31, page 601

February 23, 1967.

Application by plaintiff appellant for new trial—Plaintiff Appellant given leave to file brief by March 20, 1967; Answer Brief of Defendants Appellees to be filed by April 20, 1967.

JOSEPH A. ARTL, C. J.
Journal 31, Page 743

Received for filing, May 4, 1967.

May 4, 1967.

Application by plaintiff appellant for new trial denied. Exc.

JOSEPH A. ARTL, C. J.
Journal 32, Page 205

Received for filing, July 24, 1967.

July 20, 1967.

Motion by plaintiff appellant for judgment on its application for new trial, or, in the alternative, an order vacating and setting aside the purported journal entry of May 4, 1967, overruled Exc.

JOSEPH A. ARTL, C. J.
Journal 32, Page 486

RULES OF THE COURTS OF APPEALS.

RULE VIII. JOURNAL ENTRIES.

At such time as a decision is announced, notice thereof shall be given by mail to counsel of record in the case or by publication once in a newspaper published each court day of the week in which the assignment of cases for trial and decisions of courts of record in the county are regularly published, if there be such a publication.

Application for reconsideration of any cause or motion submitted on appeal shall be made in writing within ten days after the announcement of the Court's decision in accordance with the provisions of Section 2505.071 of the Revised Code and unless a journal entry has been presented to the Court approved by counsel for all the parties or unless the circumstances require and the Court directs

that the decision be journalized at an earlier date, no such journalization of such decision shall be made within ten (10) days of the announcement of the decision or until after the application for reconsideration shall have been disposed of by the Court if filed as required by Section 2505.071, Revised Code. Upon the granting of an application for reconsideration, the court may set the matter for rehearing.

Counsel for the party in whose favor an order, decree or judgment is announced shall, within five (5) days, unless further time be allowed by the Court or a Judge thereof, prepare the proper journal entry and submit the same to counsel for the opposite party, who shall approve or reject the same within two (2) days after its receipt by him. All objections to proposed journal entries shall be in writing, and may be answered in writing. Such entry as the Court may deem proper shall be approved by the Court, in writing, and filed with the Clerk of the Court for journalization. The provisions of this rule shall not be deemed to preclude the Court from sua sponte preparing and filing with the Clerk for journalization its own entry. No oral arguments will be heard in the settlement of journal entries or upon applications for reconsideration.

RULES OF THE SUPREME COURT OF OHIO.

Rule III, Section 8:

In those cases where the time has expired for the filing in the Court of Appeals or in the Supreme Court of a notice of appeal in a felony case, adequate reasons for the delay in such filing must be given and, where based upon facts, those facts must be evidenced by affidavit or deposition filed in support of such motion for leave to appeal.

COUNSEL'S AFFIDAVIT IN SUPPORT OF MOTION TO VACATE.

[Filed June 16, 1967.]

STATE OF OHIO,
COUNTY OF CUYAHOGA.

Robert L. Baker, being first duly sworn, deposes and says that he is one of the attorneys for The 931 East Boulevard Company, a corporation; that affiant is the office manager of the firm of Davis and Young and in his capacity as manager of the said firm, he instructed an employee of the firm to regularly examine the Daily Legal News and Cleveland Recorder for all notices of actions taken by this Court of Appeals, amongst other entries; that said employee did carefully examine the Daily Legal News and Cleveland Recorder for Friday, May 5, 1967 at page 6 and at the columns entitled "Court of Appeals"; that nowhere in said columns, a copy of which are attached hereto and marked "Exhibit A," does any notice whatsoever appear of a finding relating to The 931 East Boulevard Company; that thereafter on June 7, 1967 it came to the attention of the deponent that a finding had been announced by the Court of Appeals in late April or early May in the captioned case; that deponent has since learned through the said firm's employees that a finding in the captioned case was announced on May 4, 1967. Deponent says that prior to June 7, 1967 neither he nor any of his associates, partners or employees in the firm of Davis and Young had any knowledge of the finding of May 4, 1967 in the captioned case and that no notice was ever received by the office of Davis and Young of the said finding from the clerk of the Court of Appeals.

Further affiant saith not.

s/ ROBERT L. BAKER.
Robert L. Baker

(Jurat omitted.)

STATUTES.

Ohio Revised Code.

§ 2321.19 Application for new trial.

The application for a new trial must be made within ten days after the journal entry of a final order, judgment, or decree has been approved by the trial court in writing and filed with the clerk of the court for journalization, except for the cause of newly discovered evidence, material for the party applying, which he could not with reasonable diligence discover and produce at the trial. If a party was unavoidably prevented from filing an application for a new trial within such time, the court may in the interest of justice extend the time.

§ 2505.04 Appeal perfected.

An appeal is perfected when written notice of appeal is filed with the lower court, tribunal, officer, or commission. Where leave to appeal must be first obtained, notice of appeal shall also be filed in the appellate court. After being perfected, no appeal shall be dismissed without notice to the appellant, and no step required to be taken subsequent to the perfection of the appeal is jurisdictional.

§ 2505.07 Time for perfecting appeal.

After the journal entry of a final order, judgment, or decree has been approved by the court in writing and filed with the clerk for journalization, or after the entry of other matter for review, the period of time within which the appeal shall be perfected, unless otherwise provided by law, is as follows:

(A) Appeals to the supreme court or to courts of appeals, or from municipal courts and from probate courts

to courts of common pleas, shall be perfected within twenty days.

When a motion for a new trial or a motion for judgment under section 2323.18 of the Revised Code is filed by either party within the time provided by sections 2321.19 and 2323.181 of the Revised Code, respectively, then the time of perfecting the appeal does not begin to run, and an appeal shall not be taken, until the entry of the order overruling or sustaining the motion for judgment under section 2323.18 of the Revised Code, or the motion for a new trial, if only one of such motions have been filed, or overruling or sustaining the last of such motions decided, if motions of both kinds shall have been filed.

§ 2701.09 Publication of court calendar.

In any county in which a daily law journal is printed, the judges of the courts of record, other than the court of appeals, shall jointly designate such daily law journal as the journal in which shall be published all calendars of the courts of record in such county, which calendars shall contain the numbers and titles of causes, and names of attorneys appearing therein, together with the motion dockets and such particulars and notices respecting causes, as may be specified by the judges, and each notice required to be published by any of such judges.

§ 2703.16 Notice by publication when residence is known.

When in a case in which service may be made by publication under section 2703.14 of the Revised Code, the residence of the defendant is known, it must be stated in the publication. Immediately after the first publication,

the party making the service shall deliver copies thereof, with the proper postage, to the clerk of the court who shall mail a copy to each defendant, directed to his place of residence named therein, and make an entry thereof on the appearance docket. In all other cases the party who makes the service, or his agent or attorney, before the hearing, must make and file an affidavit that the residence of the defendant is unknown and cannot with reasonable diligence be ascertained.

EXHIBIT.

The Daily Legal News, May 4, 1967, page 12.

[*For convenience of Court and Counsel a photocopy of this document is bound in on the following page.*]

State of Ohio, Appellee vs
o Leimgruber, Appellant.
Appeal from the Court
ismissed, sua sponte, no
nstitutional question in-
C. J. Zimmerman, Mat-
Herbert, Schneider and
ncur.

State of Ohio, Appellee vs
Tutt, Appellant. Hamil-
ppeal from the Court of
issed, sua sponte, no sub-
tutional question involv-
., Zimmerman, Matthias,
rt, Schneider and Brown,

State of Ohio, Appellee vs
eld Gorring, Appellant.
y. Appeal from the Court
ismissed, sua sponte, no
nstitutional question in-
C. J., Zimmerman, Mat-
Herbert, Schneider and
ncur.

State of Ohio, Appellee vs
Dermon, Appellant. Ham-
Appeal from the Court of
issed, sua sponte, no sub-
tutional question involv-
., Zimmerman, Matthias,
rown, JJ., concur.

State of Ohio, Appellee vs
voli, Appellant. Lucas
l from the Court of Ap-
ed, sua sponte, no sub-
tutional question involv-
., Zimmerman, Matthias,
rt, Schneider and Brown,

State of Ohio, Appellee vs
Davis, Appellant. Lucas
l from the Court of Ap-
ed, sua sponte, no sub-
tutional question involv-
., Zimmerman, Matthias,
rt, Schneider and Brown,

ate, ex rel. City of Ham-
Utilities Commission of
hibition. Writ allowed.
Zimmerman, Matthias,
rt, Schneider and Brown,

d C. Foreman, et al., Ap-
ty of Bellefontaine, Ap-
County. Appeal from the
peals. Dismissed, sua
bstantial constitutional
ved. Taft, C. J., Zimmer-
, O'Neill, Herbert, Schnei-
n, JJ., concur.

State, ex rel. John W.
W. Brown, Secretary of
ndamus. Writ denied on
State, ex rel. Foreman vs
of State, 10 Ohio St. 2d
J., Zimmerman, Matthias,
rt, Schneider and Brown,

TION DOCKET

am Warner vs W. An-
et al.; J. Harvey Crow,
l Mumma et al., Appel-
unty. To certify record.

State of Ohio, Appellee vs
y, Appellant. Hamilton
leave to appeal. Over-

State of Ohio, Appellee vs
ds, Appellant. Mahoning
ave to appeal. Overruled.

State of Ohio, Appellee vs
Leimgruber, Appellant.
To certify record. Over-

State of Ohio, Appellee vs
nick, Appellant. Summit
ave to appeal. Overruled.

Will of Virginia B. Pec-
es B. Peckinpaugh, Ap-
County. To certify rec-
for want of preparation.
altimore & Ohio Rd. Co.,
rm Bureau Co-operative,
ler County. To certify
led.

State of Ohio, Appellee vs
Tutt, Appellant. Hamil-
o certify record. Over-

State of Ohio, Appellee vs
ld Gorring, Appellant.
y. For leave to appeal.

State of Ohio, Appellee vs
ermon, Appellant. Ham-
To certify record. Over-

State of Ohio, Appellee vs
Appellant. Franklin
ave to appeal. Overruled.
l Wallo, Appellee vs
Appellant. Cuyahoga
tify record. Overruled.
State of Ohio, Appellee vs
tts, Appellant. Lucas
rtify record. Overruled.
State of Ohio, Appellee vs

Keiper, Roy W. to Board of Education of Cleveland City School District, sl 9, 58.56 ft. Rumar Dr. $1100
Zeve, Ernest L., admr. de bonis non with will annexed of estate of M. Sylvia Kannesser, et al Estates to Ida Frankel, sl 2, pt sl 1, 69.1 ft. Lakeview Ave. $10
Remtgd., $10,000.
Carl, Herbert P. and Nancy A. to State of Ohio, pt sl 71, 35 ft. Wade Ave. $11,000
Bargale Land Co., Inc. to Belkin Painting Co., sls 112, 148, River Park Estates Allt. $10
Above grantee to Richard A. and Jean C. Rieger, sl 112, same. $10
Mtgd. to Union Commerce Bank, $10,000.
Williams, Millard G., et al to The Salvation Army, pt sls 8, 9, 10, 80 ft. East 59th St. $10
Rubin, Eileen to Howard Martin, pt ol 399, 49.88 ft. No. 158 East 82nd St. $10
Remtgd., $3000.
Kiena, Sue to Nathaniel A. B. and Rosemary Dean, sl 142, 35 ft. No. 3591 East 104th St. $10
Mtgd. to Builders Guarantee Title & Trust Co., $12,650—(FHA).
Euse, Jos. F. and Margaret A. to Frances LaSpina, pt ol 73, 42 ft. Nos. 17518-20 Harvard Ave. $10
Hospital Estates, Inc. to Standard Oil Co., sl 67, 45 ft. Miles Ave., and two more parcels. $10
Milliman, Andrew W. to Andrew I. Milliman, sl 202, 50 ft. Nos. 2022-24 West Blvd., and one more parcel, quit claim $10
Zeve, Ernest L., admr. de bonis non with will annexed, et al to Ida Frankel, pt sls 8, 9, 45.18 ft. East 82nd St. $10
Hoffman, Marie A. to Wm. H. and Mary E. Thompson, sl 19, 40 ft. No. 3426 East 143rd St. $10
Mtgd. to Fulton & Goss, Inc., $13,500—(VA).
Assigned to Bay Ridge Savings Bank.
Ruddy, Robert F. to June J. Ruddy, sl 165, 40.28 ft. No. 3973 West 140th St., quit claim. $10
Wilson, Clarence R. to Bernice F. Wilson, sl 50, 40 ft. No. 3666 West 159th St., (1/2 interest), quit claim....$10
Rose, Walter J. to Margie M. Rose, sl 52, 37 ft. No. 1817 Kenneth Ave., and one more parcel, quit claim....$10
Torer, Pauline to Rose Wenzl, sl 1117, 40 ft. No. 10224 Bernard Ave., quit claim. $10
Bloom, Myer, et al to Bloom Brothers Enterprises, Inc., pt ol 427, 40 ft. Buckeye Rd., quit claim. $10
Same to Same, pt ol 427, 35 ft. East 116th St., and two more parcels, quit claim. $10
Reid, Gretta H. to Olin Walker, Jr., sl 30, 40 ft. East 91st St., quit claim..$10
Smoody, Chas. E. and Betty J. to Chester B. and Marie W. Snavely, sl 199, 30 ft. No. 5305 Clark Ave. $10
Sedmak, Anton and Frances to Roxalyn Reader, pt sls 114, 115, 46.5 ft. Saranac Rd. $10
Harville, Johnnie and Alberta to The Cleveland Federal S. & L. Assn., sl 49, 40 ft. Hulda Ave., quit claim $10
Bowman, Edward and Lenora to Midwestern Realty & Investment, Inc., sl 160, 40 ft. East 125th St., quit claim $10
Kold, Joephine to Angelo DiMassa et al., pt sls 19, 20, 70 ft. Leopold Ave., and West 35th St. $10
Mtgd. to Pioneer S. & L. Co., $13,000.
Natal, Jacinto and Balbina to State of Ohio, pt sl 256, 74 ft. 7 inches Fenwick Ave. $21,500
Mendlovitz, Nathan to Rose Gelb, sl 232, 40 ft. East 142nd St. $10
Remtgd., $5000.
Weaver, Robert C., Secretary of Housing and Urban Development, to Jas. L. and Doris I. Hicks, sl 2, 34 ft. No. 428 East 118th St. $10
Mtgd. to Federal National Mtg. Assn., $16,100—(FHA).
Rhodes, Richard E. et al to Everett G. Rhodes, sl 33, 38 ft. No. 1022 East 148th St., quit claim $10
Tischler, Eugene J. and June S. to Center Street, Inc., sl 724, in Block EE, 21.83 ft. Washington St. $10
Mtgd. to Eugene J. Tischler, $10,000.
Anderson, Albert R. and Carol P. to Donald P. and Kay G. Gillotti, sl 62, 35 ft. No. 2031 West 87th St. $10
Mtgd. to The Cleveland Trust Co., $11,500.
Luwalk Property Recovery, Inc. to The Cleveland Metropolitan Housing Authority, pt sls 141, 142, 50 ft. East 59th St. $10
Kulacz, Katarzyna, excrx. estate of Julian Kulacz, to Ulysses and Annie Young, sl 35, 40 ft. East 138th St. $18,500
Kulacz, Katarzyna to Same, same..$10

MOTIONS

Department of Domestic Relations

ROOM 50—MOTIONS ASSIGNMENTS

E. DANA BROOKS, Director
Maude Maddie and Edna Maver
Assignment Clerks
Calvin B. Furlong, W. P. Hodous,
Lloyd Miller, Referees

Rule 23 (d) requires that counsel shall submit all motions (except temporary alimony motions) and (Motions for Review to the department for date and time of hearing before filing same. When Sheriff's Service is desired two copies of motion and notice must be furnished in addition to original.

Wentz, Jack R. et al to Rocky River Savings Assn., sl 5, 43.83 ft. Warren Rd., Lakewood $14,000
Spitz, Gerald I. and Mary Jo to Cleveland Trust Co., sl 4, 40 ft. Lorain Ave., and one more parcel $15,000
McCray, Isaac Jr. and Lillie R. to Fulton & Goss, Inc., pt sl 16, 25 ft. East 124th St., (refile) .....$9500—(VA)
Assigned to Central National Bank.
Carter, Wm. E. and Agnes A. to The National City Bank, sl 210, 50 ft. West 189th St. $6000
Hykes, Donald E. and Marion L. to The Lincoln S. & L. Co., pt ol 66, 50 ft. No. 3384 Scranton Rd., and one more parcel $15,650
Sullivan, Wm. E. and Rosa J. to Beneficial Mtg. Co. of Parma Heights, sl 29, 30, in Block 7, 50 ft. West 148th St., Brookpark $7410.60
Subject to mtg. to Ohio Federal S. & L. Assn.
Gabriel, Wm. J. and Emily to Columbian Federal Credit Union, sl 110, pt sl 111, 50 ft. Parkwood Dr., Euclid $13,512.92
Subject to $21,000 mtg. to First Federal S. & L. Assn. of Lakewood.
Bradley, Robert et al to Guy Colangelo, sls 32, 33, 80 ft. Rudolph Ave., Garfield Heights, and one more parcel, (Torrens) $1.00
Helinski, Chester to Alliance of Poles of America, sl 224, 40 ft. No. 7713 Bancroft Ave. $7000
Luxenberg, Herbert and Marianna to Second Federal S. & L. Assn., sl 105, 100 ft. Hermitage Rd., Beachwood and Shaker Heights $35,000
Scott, Ernest E. and Mary to Euclid Mtg. & Inv. Co., pt ol 7, No. 16621 DeForest Ave. $1620
Subject to $15,500 mtg.
Wilson, Rev. Mon Don and Willie M. to U. S. F., Inc., sl 79, 40 ft. No. 10321 Westchester Ave. $288
Jacobs Construction Co., Inc. to The Security Federal S. & L. Assn., sl 30, Worton Park Estates allt., Mayfield Heights $20,000
Same to Same, sl 31, same $20,000
Chang, Timothy Y. N. and Nancy P. C. to Cleveland Trust Co., sl 7, pt sl 6, 85 ft. Cadwell Ave., Clevve. Heights $5512.80
Subject to $14,835 mtg. to Same.
Carr, Daniel and Mildred M. to Same, sls 82 to 85, pt sl 81, 115 ft. Broadway, Maple Heights $8259.48
Keefe, James R. and Estelle L. to Same, sl 84, Richmond Country Club Estates allt. No. 2, Richmond Hts. $3421.80
Berry, Robert T. and Margaret S. to Phelps Dodge Copper Products Corp., sl 491, 218.49 ft. Merrimak Dr., Berea $5000
Subject to $26,400 mtg. to National City Bank.
Overton, Jerome F. and Donna M. to National City Bank, sl 165, Sam H. Miller Estates allt. No. 2, Parma. $2655.60
Schroeder, Robert W. and Shirley A. to Same, sl 4, 60 ft. Rose Dr., Berea $2752.20
Lewis, John and Ella B. to Cleveland Bldg. Corp., pt sls 38, 39, 40 ft. Elm St. $3957.60
Assigned to National City Bank.
Kavanaugh, Edmond M. et al to The National City Bank, pt sls 123, 124, 45 ft. Parkwood Dr. $2335.20
McMahon, James C. to Same, sl 745, 50 ft. Brinbourne Ave., Middleburg Heights $5354.02
Chew, Jos. C. and Elizabeth S. to The National City Bank, sl 67, 100 ft. Valley Forge Dr., Fairview Park $7275

The following motions will be heard in Room 50 at the time set below:

THURSDAY, MAY 4, 1967

9:00 A. M.

836634—Pickering vs Pickering. For pltff., Hollingsworth & H.
825412—Smith vs Smith. For pltff., C. James. For deft., E. J. Moroney.
842857—Cubbison vs Cubbison. For pltff., W. J. Lawko.

9:30 A. M.

834961—Cook vs Cook. For pltff., C. James.
778996—Preisendorfer vs Preisendorfer. For pltff., Griff, W. & O. For deft., W. Mahon.
837379-Gleason vs Gleason. For pltff., P. Kasdan. For deft., Fallon & M.

10:00 A. M.

842858—Christopher vs Christopher. For pltff., W. A. Lawko.
841518—Moyer vs Moyer. For pltff., W. Smith. For deft., C. Ayres.

10:30 A. M.

797873—Gappa vs Gappa. For pltff., Hollingsworth & H.
789211—Madry vs Madry. For deft., R. S. Hurley.
824427—Moore vs Moore. For pltff., E. A. Chandler.

11:00 A. M.

792700 — Cheslock vs Cheslock. For pltff., Roemisch & W. For deft., G. S. Green.
839613—Gill vs Gill. For pltff., E. F. McDermott.
839628—McClay vs McClay. For pltff., L. Stokes. For deft., Lavelle & L.

2:00 P. M.

690088—Darash vs Darash. For pltff., Atty. Baker. For deft., Baker & B.
838884—Hyatt vs Hyatt. For pltff., R. J. Lewis. For deft., C. Jackson.
819012—Flanagan vs Flanagan. For pltff., J. A. Frenden.
837284—Friedman vs Friedman. For pltff., Weiser & L. For deft., G. Savransky.

2:30 P. M.

843026-Baylers vs Baylers. For pltff., C. James.
840367—Nelson vs Nelson. For pltff., G. H. McTigue.
789740—Ruffin vs Ruffin. For pltff., E. Pedley.

3:00 P. M.

838093—Swaney vs Swaney. For pltff., Hyland & H. For deft., J. Canaris.
810119—Charms vs Charms. For pltff., D. L. Levine. For deft., K. Spero.
841773 — Likavec vs. Likavec. For pltff., B. H. Sagen.

FRIDAY, MAY 5

9:00 A. M.

836891—Pierse vs Pierse. For pltff., M. D. Barrisch.
799034—Rambasek vs Rambasek. For pltff., Spieth, B. M. & N.
843027—Lowery vs Lowery. For pltff. C. E. McLeod.

9:30 A. M.

811536—Tomaselli vs Tomaselli. For pltff., Kinchen, M. & M. For deft., Meyer & M.
843141—Vihtelic vs Vihtelic. For pltff., Biskup, K. R. F. & F. For deft., W. M. Fumich.

10 A. M.

688732—Woods vs Woods. For pltff., Parks & E.
807673—Porter vs Porter. For deft., C. R. Brubaker.
840394—Berg vs Berg. For pltff., R. Gonda. For deft., J. Krupman.

10:30 A. M.

838160—Michal vs Michal. For pltff., Krewson, L. & K.
843088—Huff vs Huff. For pltff., E. L. Watson.

11 A. M.

784871-Metzger vs Metzger. For pltff. C. James.
843110—Shell vs Shell. For deft., F. A. Polk.
749079—Erbs vs Erbs. For deft., H. J. Blum.

2:00 P. M.

756327—Bailey vs Bailey. For deft., Wyner & W.
843069—Smilanich vs Smilanich. For pltff., S. Lerner.
838643—Hochmuth vs Hochmuth. For pltff., S. Goldstein.

2:30 P. M.

774370—Kovats vs Kovats. For pltff., Hollingsworth & H.
835783—Bondra vs Bondra. For pltff. Wm. J. Tosko.

3:00 P. M.

700656—Lower vs Lower. For pltff., C. J. Oviatt.
822413—Tabor vs Tabor. For pltff., F. G. Mercer.

SATURDAY, MAY 6

9:00 A. M.

838489—Clark vs Clark. For pltff., Stephen J. Knerly.

9:30 A. M.

828846—Petty vs Petty. For pltff., W. Cooper. For deft., McDonald, H. & H.

ounty. To certify

f Ohio, Appellee vs
Appellant. Hamil-
tify record. Over-

f Ohio, Appellee vs
lorring, Appellant.
r leave to appeal.

f Ohio, Appellee vs
s, Appellant. Ham-
rtify record. Over-

f Ohio, Appellee vs
ppellant. Franklin
appeal. Overruled.
allo, Appellee vs
ellant. Cuyahoga
record. Overruled.
f Ohio, Appellee vs
Appellant. Lucas
record. Overruled.
f Ohio, Appellee vs
Appellant. Lucas
record. Overruled.
f Ohio, Appellee vs
Appellant. Lucas
record. Overruled.
ardian Acceptance
hio Valley Ins. Co.,
County. To certify

Harwick, Appellant
ommission of Ohio,
nty. To certify rec-

Turner, Appellant
man, Appellee. Sen-
rtify record. Over-

mes Frazier, et al.,
erican Aggregates
es. Licking County.
Overruled.
f Ohio, Appellee vs
s, Appellant. Scioto
record. Overruled.
Foreman, et al., Ap-
f Bellefontaine, Ap-
ty. To certify rec-

City of Toledo, Ap-
Knisley, Appellant.
dismiss appeals.

G DOCKET

s, Appellant vs Ger-
llee. Geauga County.

s, ex rel. John F.
ey J. Mucci. In Quo
ag denied.
Co., Appellant vs
oard of the City of
Appellees. Franklin
denied.
s, ex rel. John T.
Ted W. Brown, Sec-
In Mandamus. Re-

RDER'S FICE

ROY, Recorder

INUED)

DEEDS

Mike Antonelli, sl 4,
nd Ave. $10
lew Federal S. & L.

O. to State of Ohio,
q. ft. Riverdale Ave.
.....$3200
l to Katherine Fech-
33 ft. No. 7810 Lake
.....$10
Hortensia R. to Wm.
No. 1428 West 57th
.....$10
to Keystone S. & L.

extr. estate of Louis
rgaret Perry, pt sls
hool Ave., (1/2 in-
.....$9300
s to Same, same.
.....$10
leveland Trust Co.,

Nellie A. to Peter
rybus, sl 6, and pt
No. 4243 West 36th
.....$10
and Trust Co., $8000.
ephine Gibbs, sl 16,
e., quit claim ..$10
alty Co. to Earl and
sl 56, pt sl 60, 61,
Ct. $10
to United Savings
7700.

Mtgd. to Federal National Mtg. Assn., $16,100—(FHA).

Rhodes, Richard E. et al to Everett G. Rhodes, sl 33, 38 ft. No. 1022 East 148th St., quit claim $10

Tischler, Eugene J. and June S. to Center Street, Inc., sl 724, in Block EE, 21.83 ft. Washington St. $10
Mtgd. to Eugene J. Tischler, $10,000.

Anderson, Albert R. and Carol P. to Donald P. and Kay G. Giliotti, sl 62, 35 ft. No. 2031 West 87th St. $10
Mtgd. to The Cleveland Trust Co., $11,500.

Luwalk Property Recovery, Inc. to The Cleveland Metropolitan Housing Authority, pt sls 141, 142, 50 ft. East 59th St. $10

Kulacz, Katarzyna, excrx. estate of Julian Kulacz, to Ulysses and Annie Young, sl 35, 40 ft. East 138th St. $18,500

Kulacz, Katarzyna to Same, same. $10
Mtgd. to Leader Mtg. Co., $18,500 —(VA).
Assigned to Union Savings Bank of Winchester County.

Vicha, Edwin O. and Celia to Jimmie L. and Diane V. Smith, sl 52, 35 ft. No. 3379 East 10th St. $10
Mtgd. to Ohio Savings Assn., $13,750 —(FHA).

REALTY MORTGAGES

Ludwinski, Maria to Steven L. Ludwinski et al., sl 131, 40 ft. Rosewood Ave. $10

Phillbin, Mary C. to Edward M. Phillbin, sl 242, 50 ft. No. 4518 Broadale Rd. $10

Gauchat, Gerard and Edith to Pioneer S. & L. Co., sl 120, 40 ft. No. 1330 W. 76th St. $6500

Kaminski, Stella C. to Citizens Federal S. & L. Assn., sl 140, 76.33 ft. Eldridge Blvd., Bedford Hts. $10,200

Terrell, Wm. E. and Emily F. to The Broadview S. & L. Co., sl 189, 40 ft. Emerson Ave., Lakewood $5200

Singleton, Harry G. and Juanita to The Quincy S. & L. Co., sl 1, 30 ft. East 103rd St. $4600

D'Abramo, Colombo and Caterina to St. Francis DeSales Parish Federal Credit Union No. 4385, sl 80, 50 ft. Sheraton Dr., Parma $5075

Abraham, Andrew H. and Alice to The Bank of Cleveland, sl 114, 41 ft. No. 3264 East 189th St., and one more parcel $6000

Aljalee Builders, Inc. to Home Federal S. & L. Assn., pt Section 13, 82.25 ft. Lorain Rd., Fairview Park ..$68,000
Also conditional rental assignment from mortgagor to mortgagee.

Virginia, Jos. E. and Jean F. to The National City Bank, pt sls 229 to 233, Effingham Blvd., Euclid $4414.08

Minardo, Anthony and Catherine to Same, sl 128, 35 ft. Sanford Ave. $2527.20

Rutkowski, Jan and Regina to The All Star Builders, Inc., pt sls 4, 5, 50 ft. East 79th St. $4011
Assigned to National City Bank.

Kaspar, Johann H. and Hannelore X. to Cleveland Federal S. & L. Assn., pt sl 1, 40 ft. Lakewood Ave., Lakewood $11,900

Dykstra, Gerald and Grace M. to The Society National Bank, sl 84, 50 ft. Gasser Blvd., Rocky River ..$20,500

Erven, George and Margaret to U. S. F., Inc., sl 57, 40 ft. No. 13606 Horner Ave. $432

Clark, Aaron and Virginia to Wm. C. Cooper, sl 102, 35 ft. East 86th St. $4500

Kalinchak, Emil and Alice to, First Federal S. & L. Assn. of Cleveland, sl 76, 35 ft. Sladden Ave., Garfield Heights $9800

Berg, Julius J. and Lorraine M. to The Citizens Federal S. & L. Assn., sl 58, pt sl 57, 44.55 ft. Hurley St., and one more parcel $3946.80
Subject to mtg. to Equitable Life Ins. Co.

Moellering, Harvey W. and Erma to First Federal S. & L. Assn. of Lakewood, pt Section 14, 45 ft. Story Rd., Rocky River $1981.44

Kusyk, Stephen A. and Ednarita to The Cleveland Trust Co., pt sls 288, 289, 40 ft. South Hills Dr. $4092

Rosenfeld, Bernard S. and Marcia F. to Same, sl 288, 45 ft. E. Baintree Rd., Beachwood $2359.80
Subject to $13,000 mtg. to Metropolitan S. & L. Co.

Schulte, John J. and Bernadette A. to Continental Bank, pt ols 45, 46, 65 ft. Glynn Rd., East Cleveland ..$12,500
Subject to $16,200 mtg. to Cleveland Trust Co.

Krause, David and Marcia to Continental Bank, sl 144, Bexley Park allt. South Euclid .....$4671.72.
Subject to $11,000 mtg. to Central National Bank.

Lochridge, Inc. to Women's Federal S. & L. Assn., sl 38, 95 ft. Brentwood Dr., Olmsted Falls $18,200

City Bank.

Overton, Jerome F. and Donna M. to National City Bank, sl 165, Sam H. Miller Estates allt. No. 2, Parma. $2655.60

Schroeder, Robert W. and Shirley A. to Same, sl 4, 60 ft. Rose Dr., Berea $2752.20

Lewis, John and Ella B. to Cleveland Bldg. Corp., pt sls 38, 39, 40 ft. Elm St. $3957.60
Assigned to National City Bank.

Kavanaugh, Edmond M. et al to The National City Bank, pt sls 123, 124, 45 ft. Parkwood Dr. $2335.20

McMahon, James C. to Same, sl 745, 50 ft. Brinbourne Ave., Middleburg Heights $5354.02

Chew, Jos. C. and Elizabeth S. to The National City Bank, sl 67, 100 ft. Valley Forge Dr., Fairview Park $7275

Weitzenbach, Phillip and Marie J. to The Cleveland Trust Co., pt ol 17, Tr. 6, MacKenzie Rd., Olmsted Township and one more parcel $3539.88
Subject to Mtg. to same.

Stanard, Harold A. and Pearl H. to same, sl 57, 35 ft. E. 111th St. $1769.76

Walsh, Ed. and Anna M. to same, sl 23, 35 ft. Independence Rd. and one more parcel $1097.46

Odabashian, Hratchia and Barbara to same, sl 346, 40 ft. East 61st St. and one more parcel $1769.76

Wesley, Lloyd and Constance to same, sl 64, 40 ft. Delora Avenue, Brooklyn $2239.92

Gosson, Josephine A. et al to same, sl 46, 52.69 ft. Granger St., Lakewood $1089.90

Peyton, Paul D. and Gloria A. to same, sl 218, 40 ft. Thornhope Rd. ..$1438.74
Subject to Mtg. to Advance Mtg. Co.

Beck, Edgar J. and Ellen I. to same, sl 33, 62.5 ft. Briarwood Dr., Fairview Park $2479.68

The Gordon Homes, Inc. to Meridjan Mtg. Corp., sl 25, Richard Allt. No. 3, Parma. $21,300

Budsiak, DeGraeve, Kapral Builders, Inc. to Cleveland Federal S. & L. Assn., sl 16, 89.99 ft. Pin Oak Drive, Parma $14,000

Herman, Harvey and Eleanor to Euclid Mtg. & Inv. Co., sl 212, 40 ft. East 99th St., (refile) $1270

Woodbury Homes, Inc. to Cleveland Federal S. & L. Assn., sl 198, 70.01 ft. Park Ridge Dr., North Olmsted $13,200
Same to same, sl 138, 70.01 ft. same $23,200

Kitner, Paul I. and Barbara to National Acceptance Co. of America, sl 420, 60 ft. Beachwood Blvd., Beachwood and 1 more parcel $15,000

Boross, Laszlo and Susie to Clarence Bolek, d. b. a. Great Lakes Welding & Boiler Co., pt sl 58, 59, 82 ft. No. 12907-11 Union Ave. $4665.84
Assgined to Union Commerce Bank.
Subject to $15,000 Mtg. to Cleveland Trust Co.

Assured Mtg. & Loan Co. to Union Savings Assn., sl 1532, 40 ft. Winchell Rd., Shaker Hts. $24,000

Foster, James G. and Lynn M. to Third Federal S. & L. Assn., sl 113, Western Hts. Allt. No. 1, Parma (refile) $18,000

Correnti, Mike A. and Carmeline A. to Union Commerce Bank, sl 341, 40 ft. Strathavon Rd., Shaker Hts. ..$5517
Subject to $11,000 Mtg. to Shaker S. & L. Co.

Jurgensen, Elmer T. and Lucille R. to Cleveland Federal S. & L. Assn., sl 16, 40 ft. Lakewood Ave., Lakewood $12,000

C. Kubek Builders, Inc. to Herbert I. Baker, sl 1, 53.01 ft. Summit Rd., Maple Hts. and 4 more parcel $30,000
Subject to Mtgs. to United Savings Assn.

Shuster, Rosemary K. to Women's Federal S. & L. Assn., sl 136 Broad-Valle Allt., No. 1, Parma $11,500

Litten, C. Thompson and Ruth J. to Citizens Federal S. & L. Assn., sl 911, Briar Cliff Allt. No. 6, Middleburgh Hts. $4059
Subject to Mtg. to same.

Root, James and Esther to same, pt sl 301, 46.32 ft. No. 19526 Henry Rd., Fairview Park $1883.80
Subject to Mtg. to National City Bank.

Uhrman, Solomon and Charlotte to The Superior S. & L. Assn., sl 102, 45 ft. Silsby Rd., University Hts. $1240

Popes, Kenneth L. and Rosalee to same, sl 33, 40 ft. Warren Rd., Lakewood $28,000

Gutknecht, Edgar E. and Helen R. to Society National Bank, sl 12 pt 15, 143.9 ft. Nelson Park Dr., Rocky River $15,000

Hoffman Const. Co., Inc. to Frank and Mgt. Colb, pt ol 28, Tr. 6, 200.86 ft. South Green Rd., South Euclid $13,500
Subject to $60,000 Mtg. to Shaker Savings Assn.

Reinke, Russell R. and Neva L. B. to C. Kubek Builders, Inc., sl 17, Daisy Ave., Extn., Independence $2500

Wyner & W.

843069—Smilanich vs Smilanich. For pltff., S. Lerner.

838643—Hochmuth vs Hochmuth. For pltff., S. Goldstein.

2:30 P. M.

774370—Kovats vs Kovats. For pltff., Hollingsworth & H.

835783—Bondra vs Bondra. For pltff. Wm. J. Tosko.

3:00 P. M.

700656—Lower vs Lower. For pltff., C. J. Oviatt.

822413—Tabor vs Tabor. For pltff., F. G. Mercer.

SATURDAY, MAY 6

9:00 A. M.

838489—Clark vs Clark. For pltff., Stephen J. Knerly.

9:30 A. M.

828846—Petty vs Petty. For pltff., W. Cooper. For deft., McDonald, H. & H.

10 A. M.

797744—Axford vs Axford. For pltff., Sweeney & M. For deft., H. J. Dworkin.

11 A. M.

819986—Oatman vs Oatman. For pltff. C. L. Chavers. For deft., C. W. Fleming.

MONDAY, MAY 8, 1967

9:30 A. M.

836208—Bradesku vs Bradesku. For pltff., C. Oviatt. For deft., H. Starkoff.

836388—Dowell vs Dowell. For pltff., C. James. For deft., S. Amdur.

824169—Kirwin vs Kirwin. For deft., R. L. Baylog.

9:30 A. M.

842573 — Luthringer vs Luthringer. For pltff., E. J. Moroney.

835956—Baker vs Baker. For pltff., L. P. Fernberg, Jr.

840275 — Hummel vs Hummel. For pltff., Cerrezin & C.

10:00 A. M.

837465—Egger vs Egger. For pltff., W. A. Welty. For deft., C. W. Kitchen.

812745—Peters vs Peters. For pltff., J. J. Yelson. For deft., P. Zimmerman.

830885—Payne vs Payne. For pltff., D. Browning.

834919 — Price vs Price. For pltff., Van Aken, A. B. & W. For deft., J. V. Donnelly.

10:30 A. M.

805616-Direnzo vs Direnzo. For pltff., Lustig, I. & L.

842188 — Mitchell vs Mitchell. For pltff., Koplow, V. P. & P.

843135—Radike vs Radike. For pltff., J. L. Zelasny.

11:00 A. M.

607310—Vari vs Vari. For pltff., C. Bradler.

843187—Statzer vs Statzer. For pltff., Benjamin & W.

716805—Schwartz vs Schwartz. For pltff., N. Simon.

2:00 P. M.

841843 — Mitchell vs Mitchell. For pltff., Krause, K. & F. For deft., C. Thomas.

762241 — Masciere vs Masciere. For deft., Danaceau, B. H. & R.

812958—Powell vs Powell. For deft., Garber, G. & J.

837071—Ashworth vs Ashworth. For pltff., P. Onysko. For deft., L. J. Weiner.

2:30 P. M.

714391—Dagy vs Dagy. For pltff., H. H. Starkoff.

812502 — Egiit vs Egiit. For pltff., Gurney ½ M.

833893—Zoretic vs Zoretic. For pltff., W. H. Stone.

3:00 P. M.

794306—Hrach vs Hrach. For pltff., J. P. Conway.

803491—Campana vs Campana. For pltff., Feingold & H.

842184 — Galarsa vs Galarsa. For pltff., A. L. Gray.

ENFORCEMENT DIVISION

THURSDAY, MAY 4

9:00 A. M.

788541 — Brunnet, Cevilia vs Emil. For pltff., P.P.

10 A. M.

775507—Brisbine, Patricia vs Donald. For pltff., P.P.

11 A. M.

756315—Lee, Horace vs Frances. For pltff., P.P.

2:00 P. M.

759509—Feke, Marguerite vs Albert. For pltff., P.P.

New Incorporations

Greater Cleveland Arts Council, (not for profit). Malvin E. Bank, David C. Prugh, Charles K. Russell. Agent, Malvin E. Banks, 1100 National City Bank Bldg.

Auto Electric Supply, Inc., 500 shares no par common. V. W. McClelland, Agnes Strok, L. J. Merkel. Agent, L. J. Merkel, 215 Euclid Ave.

COURT OF APPEALS ASSIGNMENT LIST

HON. J. J. P. CORRIGAN, Chief Justice; HON. DANIEL H. WASSERMAN, HON. LEE E. SKEEL, HON. JOSEPH H. SILBERT, HON. CHARLES W. WHITE, HON. JOSEPH A. ARTL, Judges.

TOM S. DWYER
Assignment Commissioner
MAin 1-3285

NOTICE TO ATTORNEYS

The attention of the Bar is invited to Rule VII of the Court of Appeals which, inter alia, fixes the time for the filings of briefs. Cases in which appellants do not comply with the rule are subject to dismissal. Any extension of time to either party will be granted only upon written motion and for good cause shown.

Counsel desiring to discuss any matter of procedure with members of the Court of Appeals must notify all opposing counsel of their intention and also the time of such proposed appearance and the matter to be discussed. This rule will be adhered to strictly.

J. J. P. CORRIGAN,
Chief Justice

Following cases to be heard on merits:

THURSDAY, MAY 4
9:30 A. M.

28299—Law, C. P.—E. P. I. of Cleveland, Inc. vs Basler et al. For pltff. appellant: Bremer, T. M. & C. For defts. appellees: S. W. Likover.

28137—Law, Cleve. M. Ct.—Miazga vs Firestone Tire & Rubber Co. For pltff. appellant: Rudd, O. & M. For deft. appellee: Jones, D. C. & R.

1:30 P. M.

28134—Law, C.P.—Alonso vs The William B. Pollock Co. For pltff. appellee, Dudnik, K. N., etc. For deft. appellant, Johnson, W. H. F. S. & P.

28404—Law C.P.—Gross, Tr. in Bankruptcy vs Dolin. For pltff. appellant, L. J. Haase. For deft. appellee, Greenfield & M.

DISMISSAL LIST

The following case in which the appellant has not complied with Rule V by filing brief and assignments of error are to be dismissed on Monday, May 15, 1967, unless brief and assignments of error are filed by May 13, 1967:

28537—Law, C. P. Cr.—State of Ohio vs Walker. For pltff., J. T. Corrigan, Pros. Atty. For deft. appellant: Edw. Brown.

28210—Law, Cleve. Hts. M. Ct.—Cleveland Acceptance Corp. vs Davenport, Jr. For pltff. appellant: D. N. Krosin. For deft. appellee: R. A. Williams.

28330—Law, Parma M. Ct.—Salem, d. b. a. Salem's Plumbing & Heating vs Mackert. For pltff. appellant: Small & W. For deft. appellee: P. W. Cassidy.

28300—Law, Juv. Ct.—In the matter of Mary Bogard, etc. For appellant: J. Abrams.

28303—Law, Pr. Ct.—In re: Estate of Rose M. Hoelke, dec. Appeal by Ruth M. Kristof. For appellant: P. Mancino and I. M. Kotulic.

28311—Law, Juv. Ct.—In the matter of Larry Garrett, etc. For appellant: J. Abrams.

28332—Law, Lyndhurst M. Ct.—Price vs Ursem et al. For pltff appellant: I. Trombetta. For defts. appellees: Hauxhurst, S. M. & B.

28343—Law, C. P.—Long, admr. etc. vs St. Luke's Hospital Assn. of Cleveland, Ohio of the Methodist Episcopal Church. For pltff. appellant: D'Arnold Davis. For deft. appellee: Arter, H. W. & Y.

28347—Law, C. P. Cr.—State of Ohio vs Robinson. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: A. L. Adelstein.

28351—Law, C. P.—Burns, a minor, by her mother Margaret Miller vs Burns. For pltff. appellant, Hickey & J. For deft. appellee: Belkin, B. K. & S.

28353—Law, C. P.—Irwin vs Irwin. For pltff. appellee: Rocker, K. K. Y. & A. For deft. appellant: Daus, S. & K.

28355—Law, C. P. Cr.—State of Ohio vs Stewart. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft., appellant: P. P.

28358—Law, Juv. Ct.—State of Ohio vs Jester. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: Dachman & D.

28360—Law, Pr. Ct.—City of Cleveland vs R. & N. Investment Co., et al. The Capital National Bank, appellant. For pltff. appellee, B. J. Klementowicz, Law Dir. For deft., appellant: Starkoff, Y. & E. and Benesch, F. M. & C.

28363—Law, Juv. Ct.—Green vs Green. For pltff. appellee, J. Haynes. For deft. appellant: R. Coleman.

28368—Law, East Cleve. M. Ct.—Brown vs Shears. For pltff. appellee, A. A. Herzog. For deft., appellant: C. E. Mosley, Jr.

28376—Law, C. P. Cr.—State of Ohio vs Lowe. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: J. R. Willis.

28380—Law, Cleve. M. Ct.—Yenchik et al vs Third Federal S. & L. Assn. of Cleveland et al, Edw. Orlinski, appellant. For pltffs. appellees: S. Kormendy. For deft. appellant: G. Wm. Joseph, Jr. For defts. appellees: Hisey, C. & M.

28073—Law, Parma M.C.—City of Parma vs Burge. For pltff. appellee, Pros. Atty. For deft. appellant, W. L. Blake.

1:30 P. M.

28169—Law, C.P.—Voss vs Karpinski, etc. et al. For pltff., appellant, McManamon & M. For defts. appellees, City Law Dir., W. T. McKnight.

28256—Law, Pr. Ct.—In re: Estate of Isaac N. Graham, deceased. For appellant (Edna Curry Graham): Harold Weinstein and Richard W. Dunn. For appellee, ———.

LAW AND FACT CALL

The following cases filed on law and fact will be called to determine whether or not the cased will proceed to trial on law and fact. Counsel for each litigant is requested to be present at 9:30 A. M., on Monday, May 15, 1967.

28459—Law & Fact, C.P. Cr.—State of Ohio vs McAfee. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: Mancino, M. & M.

28461—Law & Fact, C.P.—Entis vs Toppel. For pltff. appellant: Dudnik, K. N. P. D. & J. For deft. appellee: Arter, H. W. & V.

28467—Law & Fact, C.P. Cr.—State of Ohio vs Campbell. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: W. B. Saunders.

28469—Law & Fact, C.P.—Peters vs Peters. For pltff. appellant: Savage, Z. & O. For deft. appellee: Clyne, K. R. & T.

28475—Law & Fact, C.P.—In the Matter of the Appropriation by the State of Ohio of an Easement for Highway Purposes over the property of Chester Pawlak, et al. Appeal by State of Ohio, P. E. Masheter, Dir. of Highways. For appellant: W. B. Saxbe, Atty Gen., R. D. Eisenberg. For appellees: T. McGarry.

28478—Law & Fact, C.P.—Foy vs Palmieri, et al. For pltff. appellant: A. R. Gamble. For defts. appellees: D. J. Lombardo.

28488—Law & Fact, Cleve. M. Ct.—International Auto Rental, Inc. vs Ganim Brothers, Inc. For pltff. appellant: Zipkin, Y. & T., D. C. Turoff. For defts. appellee: A. M. Spero.

28503—Law & Fact, Cleve. M. Ct.—King vs Moutoux. For pltff. appellant: Dudnik, K. N., et al. For deft. appellee: Hermann & R.

28505—Law & Law & Fact, Garfield Hgts. M. Ct.—Rowles, et al vs Imperial Aluminum, Inc. For pltffs. appellees: Hershey, B. W. S. C. & W., Akron, O. For deft. appellant: L. P. Gilbert.

28510—Law & Fact, Juv. Ct.—In re: Ronald Ralph Cartwright. For appellant: B. H. Sagen. For appellee: ———.

28515—Law & Fact, C.P.—Zollos vs City of Cleveland, et al. For pltff. appellee: DeGrandis & M. For deft. appellant: B. J. Klementowicz, Law Dir., J. Mancino, R. Marco.

28519—Law & Fact, Juv. Ct.—State of Ohio vs Kyler. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: R. E. Kleinman.

28521—Law & Fact, C. P.—Jovanovic vs Simich, et al (appellees), and Robt. E. Jakovich (appellant). For pltff. appellee: Bulkley & B. For defts. appellees: Leanza, L. F. & M. For deft. appellant: R. A. Stachewics.

28522—Law & Fact, Euclid M. Ct.—Rhyme Realty Co. vs Border, et al. For pltff. appellee: P. W. Flanigan. For defts. appellants: J. J. Wargo.

28524—Law & Fact, C.P.—Mark Elliot, Inc. vs N. Singer, Commissioner of Building. For pltff: appellee: Kahn, K. Y. & A. For deft. appellant: B. J. Klementowicz, Law Dir.

28526—Law & Fact, C.P.—Jovanovic vs Simich, et al. For pltff. appellee: Strangward, M. L. & M., and Bulkley & B. For defts. appellants: Leanza, L. F. & M.

28527—Law & Fact, Shaker Hgts. M. Ct.—Schwartz vs Strassberg Building Co. For pltff. appellee: Ornstein, D. & B. For deft. appellant: Roemisch & W.

28529—Law & Fact, C.P.—Gerson, et al vs Bieger, et al. For pltffs. appellants: D. B. Shillman. For defts. appellees: Webster & B.

28530—Law & Fact, Pr. Ct.—Mary Schenk, Extrx. of Estate of Anna Burda Podzimek, et al vs Yaro Podzimek. For pltffs. appellees: C. Bernard. For deft. appellant: B. Herzbrun.

28532—Law & Fact, C.P.—Wilson, Jr. vs Wilson. For pltff. appellee: Rollins & M. For deft. appellant: Lavelle & L.

28533—Law & Fact, C.P.—Kelemen vs Kelemen. For pltff. appellee: M. Katz. For deft. appellant: M. A. Sicherman.

28538—Law & Fact, C.P.—Star-Lite Restaurant & Lounge, Inc. vs Liquor Control Commission of State of Ohio, et al. For pltff. appellant: F. Mancino. For deft. appellees: W. B. Saxbe, Atty. Gen.

28539—Law & Fact, C.P.—Star-Lite Restaurant & Lounge, Inc. vs Liquor Control Commission of State of Ohio, et al. For pltff. appellant: F. Mancino. For defts. appellees: W. B. Saxbe, Atty. Gen.

28541—Law & Fact, C.P. Cr.—State of Ohio vs Julius Highsmith, et al. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: (Julius Highsmith) C. E. McLeod.

28542—Law & Fact, C.P. Cr.—State of Ohio vs Solomon, Jr. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: C. W. Lassaro.

MONDAY, MAY 15

COURT OF APPEALS

HON. J. J. P. CORRIGAN, Chief Justice; HON. DANIEL H. WASSERMAN, HON. LEE E. SKEEL, HON. JOSEPH H. SILBERT, HON. CHARLES W. WHITE, HON. JOSEPH A. ARTL, Judges.

TOM S. DWYER
Assignment Commissioner
MAin 1-3285

TRIAL DOCKET

28035—C. P.—DeMooy et al vs Greve, extrx., etc. et al. Judgment reversed as contrary to law and cause remanded for further proceedings according to law for the reason that prejudicial error was committed when the court charged upon undue influence when there was a total absence of evidence of undue influence; and court erred on the admission of opinion evidence of lay witnesses as to the mental condition of the testratrix without sufficient foundation to justify such opinion; and further that the record discloses that the finding of the jury is against the greater weight of the evidence. Exceptions. O. S. J. (Artl, C. J., Wasserman, J., White, J., concur).

28331—C. P.—In re: Vinlyn Elizabeth Barnes, etc. Appeal by Mary Virginia Barnes, a. k. a. Mary Virginia Stewart. On application of appellant, case dismissed as being moot at appellant's costs. Exceptions. Mandate to issue. (Wasserman, P. J., White, J., Artl, J., concur).

28304—C. P. Cr.—State of Ohio vs Arkey. Judgment affirmed. Exceptions. O. S. J. (Same).

28171—C. P.—State of Ohio vs Johnson. Judgment affirmed. Exceptions. O. S. J. (Corrigan, C. J., Skeel, J., Silbert, J., concur).

28264—C. P.—Marks vs Greene. Judgment affirmed. Exceptions. O. S. J. (Same).

28110—C. P. Cr.—State of Ohio vs Thomas. The conviction and judgment upon the counts in the indictment charging possession of narcotics is reversed as contrary to law for the reason that possession of narcotics is a lesser included offense in an indictment charging possession of narcotics for sale, of which the appellant was convicted. The judgment of the court upon the counts charging possession of narcotics is set aside and held for naught and the defendant is discharged as to said counts. See State v. Johnson, 112 Ohio App. 134, par. 4 of syllabus. The conviction and judgment upon the counts in the indictment charging possession of narcotics for sale is affirmed. Exceptions. O. S. J. (Wasserman, P. J., White, J., Artl, J., concur).

28269—Pr. Ct.—In re: Estate of Alexander Wilson Steel, dec. Appeal by Ruth O. Stilson. Judgment affirmed. Exceptions. O. S. J. See memorandum to lawyers ordered filed with papers in the case. (Wasserman, P. J., Silbert, J., White, J., concur).

27746—Mandamus—The State of Ohio ex rel. Vincent E. Donnelly et al vs The City of Fairview Park, O, et al. Writ denied. Exceptions. O. S. J. See Memorandum to lawyers ordered filed with the papers in the case. (Corrigan, C. J., White, J., Artl, J., concur).

28077—Cleve. M. C.—Wooten vs J. J. White Products Co., etc. Judgment reversed as contrary to law for reason that the amount of verdict is so excessive as to establish passion and prejudice on the part of the jury and cause remanded for further proceedings according to law. Exceptions. O. S. J. (Corrigan, C. J., Skeel, J., Silbert, J., concur).

28098—Juv. Ct.—In re: Rebecca Whitmer, believed to be a dependent child. Appeal by Betty Whitmer. Judgment reversed as contrary to law in that Sec. 5103.16, R. C. has no application to the facts in this case as disclosed by the record. Cause remanded for further proceedings according to law. Exceptions. O. S. J. (Same).

27942—Cleve. M. C.—Admiral Merchant's Motor Freight vs Glenn Cartage Co. Judgment reversed as contrary to law for reason that court below directed a verdict for plaintiff at close of all the evidence, when, as shown by the record, issues of fact were presented upon which reasonable minds could come to different conclusions on question of plaintiff's contributory negligence and question of proximate cause. Cause remanded for further proceedings according to law. Exceptions. O. S. J. (Same.)

27943—Cleve. M. C.—Same vs Same. Same. (Same).

28326—Cleve. M. C.—Carter vs The Paramount Finance Co. Judgment reversed as contrary to law. Action in the Municipal Court constitutes a collateral attack, contrary to law, on a subsisting judgment by the Court of Common Pleas of Summit County which had not been satisfied. Judgment of Municipal Court set aside and held for naught and final judgment for deft. Exceptions. O. S. J. (Wasserman, P. J., White, J., Artl, J., concur).

27920—C. P.—Miller vs Kubick, Jr., et al. Judgment reversed as contrary to law and cause remanded for further proceedings according to law for the reason that prejudicial error was committed by the trial court which prevented plaintiff from having a fair trial in that on the state of the record the trial court invaded the province of the

40582—The State of Ohio, ... Frederick Arno Leimgruber, Wood County. Appeal from ... of Appeals. Dismissed, sua ... substantial constitutional q... volved. Taft, C. J. Zimmer... thias, O'Neill, Herbert, Schn... Brown, JJ., concur.

40642—The State of Ohio, ... James Forest Tutt, Appella... ton County. Appeal from th... Appeals. Dismissed, sua spon... stantial constitutional questi... ed. Taft, C. J., Zimmerman, ... O'Neill, Herbert, Schneider a... JJ., concur.

40644—The State of Ohio, ... George Garfield Gorring, ... Summit County. Appeal from ... of Appeals. Dismissed, sua ... substantial constitutional qu... volved. Taft, C. J., Zimmerm... thias, O'Neill, Herbert, Schn... Brown, JJ., concur.

40657—The State of Ohio, A... David Myers Dermon, Appell... ilton County. Appeal from th... Appeals. Dismissed, sua spont... stantial constitutional questi... ed. Taft, C. J., Zimmerman, ... Herbert and Brown, JJ., conc...

40690—The State of Ohio, A... Thomas Licavoli, Appellan... County. Appeal from the Cou... peals. Dismissed, sua sponte, ... stantial constitutional questi... ed. Taft, C. J., Zimmerman, ... O'Neill, Herbert, Schneider an... JJ., concur.

40692—The State of Ohio, A... Paul Percy Davis, Appellan... County. Appeal from the Cou... peals. Dismissed, sua sponte, ... stantial constitutional questi... ed. Taft, C. J., Zimmerman, ... O'Neill, Herbert, Schneider an... JJ., concur.

40693—The State, ex rel. City ... ilton vs Public Utilities Comm... Ohio. In Prohibition. Writ ... Taft, C. J., Zimmerman, ... O'Neill, Herbert, Schneider an... JJ., concur.

40777—Harold C. Foreman, ... pellants vs City of Bellefont... pellee. Logan County. Appeal ... Court of Appeals. Dismis... sponte, no substantial cons... question involved. Taft, C. J., ... man, Matthias, O'Neill, Herber... der and Brown, JJ., concur.

40936—The State, ex rel. ... Hayes vs Ted W. Brown, Sec... State. In Mandamus. Writ d... authority of State, ex rel. Fo... Brown, Secy. of State, 10 Oh... 139. Taft, C. J., Zimmerman, ... O'Neill, Herbert, Schneider an... JJ., concur.

MOTION DOCKET

40518—William Warner vs ... thony Torsell, et al.; J. Harv... Appellant; Carl Mumma et al ... lees. Clark County. To certif... Overruled.

40521—The State of Ohio, Ap... Dorsie Conley, Appellant. ... County. For leave to appea... ruled.

40525—The State of Ohio, Ap... Daniel N. Woods, Appellant. ... County. For leave to appeal. O...

40582—The State of Ohio, Ap... Frederick Arno Leimgruber, A... Wood County. To certify reco... ruled.

40593—The State of Ohio, Ap... Larry McCormick, Appellant. ... County. For leave to appeal. O...

40638—In re: Will of Virginia ... kinpaugh: Barnes B. Peckinpa... pellant. Lucas County. To cer... ord. Dismissed for want of pre...

40640—The Baltimore & Ohio ... Appellee vs Farm Bureau Co-o... Appellant. Butler County. To ... record. Overruled.

40642—The State of Ohio, Ap... James Forest Tutt, Appellant, ... ton County. To certify recor... ruled.

40644—The State of Ohio, Ap... George Garfield Gorring, A... Summit County. For leave to ... Overruled.

40657—The State of Ohio, Ap... David Myers Dermon, Appellan... ilton County. To certify recor... ruled.

40658—The State of Ohio, Ap... Herbert Trout, Appellant. ... County. For leave to appeal. O...

40686—Michael Wallo, App... Mary Wallo, Appellant. C... County. To certify record. Over...

40687—The State of Ohio, Ap... John H. Knotts, Appellant. ... County. To certify record. O...

40690—The State of Ohio, Ap... Thomas Licavoli, Appellant. ... County. To certify record. O...

40692—The State of Ohio, Ap... Paul Percy Davis, Appellant ... County. To certify record. Over...

40700—Midland Guardian Ac... Co., Appellant vs Ohio Valley ... Appellee. Hamilton County. To ... record. Overruled.

40718—Burton L. Harwick, A... vs Liquor Control Commission ... Appellee. Lucas County. To cer... ord. Overruled.

40722—Barbara A. Turner, A... vs Michael A. Buchman, Appell... eca County. To certify recor... ruled.

40728—Dennis James Frazie... Appellants vs American A...

28300—Law, Juv. Ct.—In the matter of Mary Bogard, etc. For appellant: J. Abrams.

28303—Law, Pr. Ct.—In re: Estate of Rose M. Hoelke, dec. Appeal by Ruth M. Kristof. For appellant: P. Mancino and I. M. Kotulic.

28311—Law, Juv. Ct.—In the matter of Larry Garrett, etc. For appellant: J. Abrams.

28332—Law, Lyndhurst M. Ct.—Price vs Ursem et al. For pltff appellant: I. Trombetta. For defts. appellees: Hauxhurst, S. M. & B.

28342—Law, C. P.—Long, admr. etc. vs St. Luke's Hospital Assn. of Cleveland, Ohio of the Methodist Episcopal Church. For pltff. appellant: D'Arnold Davis. For deft. appellee: Arter, H. W. & V.

28347—Law, C. P. Cr.—State of Ohio vs Robinson. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: A. L. Adelstein.

28351—Law, C. P.—Burns, a minor, by her mother Margaret Miller vs Burns. For pltff. appellant, Hickey & J. For deft. appellee: Belkin, B. K. & S.

28353—Law, C. P.—Irwin vs Irwin. For pltff. appellee: Rocker, K. K. Y. & A. For deft. appellant: Daus, S. & K.

28355—Law, C. P. Cr.—State of Ohio vs Stewart. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft., appellant: P. P.

28358—Law, Juv. Ct.—State of Ohio vs Jester. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: Dachman & D.

28360—Law, Pr. Ct.—City of Cleveland vs R. & N. Investment Co., et al. The Capital National Bank, appellant. For pltff. appellee, B. J. Klementowicz, Law Dir. For deft., appellant: Starkoff, Y. & E. and Benesch, F. M. & C.

28363—Law, Juv. Ct.—Green vs Green. For pltff. appellee, J. Haynes. For dft. appellant: R. Coleman.

28368—Law, East Cleve. M. Ct.—Brown vs Shears. For pltff. appellee. A. A. Hersog. For deft., appellant: C. E. Mosley, Jr.

28376—Law, C. P. Cr.—State of Ohio vs Lowe. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: J. R. Willis.

28380—Law, Cleve. M. Ct.—Yenchik et al vs Third Federal S. & L. Assn. of Cleveland et al. Edw. Orlinski, appellant. For pltffs. appellees: S. Kormendy. For deft. appellant: G. Wm. Joseph, Jr. For defts. appellees: Hisey, C. & M.

28383—Law, Cleve. M. Ct.—Economy S. & L. Co. vs Grant. For pltff. appellant: L. B. Scharfeld. For deft. appellee: T. P. McIntyre.

28386—Law, Juv. Ct.—In the matter of Victor S. McDowell, believed to be a juvenile traffic offender. For appellant: E. A. Chandler.

28394—Law, Bedford M. Ct.—Thomas vs Scott Industries, Inc. For pltff. appellant: S. Likover. For deft. appellee: J. R. Hull and Hull & M.

28396—Law, C. P. Cr.—State of Ohio vs Zillner. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: J. B. White.

28405—Law, C. P.—Martin et al vs K. & S. Investment Co. For pltffs. appellants: Hollingsworth & H. For deft. appellee: Terrell, W. & S.

28423—Law, Cleve. M. Ct.—Laver et al vs Kulber. For pltffs. appellees: Grossman, F. C. K. & D. For deft. appellant: J. L. Newman

28434—Law, C. P.Cr.—State of Ohio vs Kosinski. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: P. P.

MONDAY, MAY 8

9:00 A. M.

Motions, Demurrers and Applications. Following cases to be heard on merits:

1:30 P. M.

28090—Law, Euclid M.C.—Culmer vs Miller et al. For pltff. appellee, J. V. Donnelly. For defts. appellants, Hribar & C.

28100—Law, C.P., Cr.—State of Ohio vs Miner. For pltff. appellee, Pros. Atty. For deft. appellant, J. R. Willis.

TUESDAY, MAY 9

9:30 A. M.

27963—Law, C.P.—State of Ohio, Liquor Control Commission vs Patterson. For pltff. appellee, Atty. Gen. For deft. appellant, S. E. Tolliver.

27981—Law, Cleve. Hts. M.C.—Jaguar-Cleveland Motors vs Powell. For pltff. appellant, Zipkin & Z. For deft. appellee, J. H. Bever.

1:30 P. M.

28115—Law, C.P. Cr.—State of Ohio vs Wright. For pltff. appellee, Pros. Atty. For deft. appellant, J. H. Carson, Jr.

28116—Law, C.P. Cr.—State of Ohio vs Hogan. For pltff. appellee, Pos. Atty. For deft. appellant, J. R. Willis.

WEDNESDAY, MAY 10

9:30 A. M.

27968—Law, Shaker Hts. M.C.—City of Beachwood vs Voss. For pltff. appellee, A. M. Heavilin. For deft. appellant, Bulkley & B.

27969—Law, Shaker Hts. M.C.—City of Beachwood vs Meridith. For pltff. appellee, A. M. Heavilin. For deft. appellant, Bulkley & B.

1:30 P. M.

28119—Law C.P., Cr.—State of Ohio vs Zebrowski. For pltff. appellee, Pros. Atty. For deft. appellant, J. P. Butler.

28148—Law, C.P. Cr.—State of Ohio vs Mertes. For pltff. appellee, Pos. Atty. For deft. appellant, Elmer Giuliani, Public Defender

THURSDAY, MAY 11

9:30 A. M.

27997—Law, C.P. Cr.—State of Ohio vs Finley. For pltff. appellee, Pros. Atty. For deft. appellant, Rini & H.

28521—Law & Fact, C. P.—Jovanovic vs Simich, et al (appellees), and Robt. E. Jakovich (appellant). For pltff. appellee: Bulkley & B. For defts. appellees: Leanza, L. F. & M. For deft. appellant: R. A. Stachewicz.

28522—Law & Fact, Euclid M. Ct.—Rhyme Realty Co. vs Border, et al. For pltff. appellee: P. W. Flanigan. For defts. appellants: J. J. Wargo.

28524—Law & Fact, C.P.—Mark Elliot, Inc. vs N. Singer, Commissioner of Building. For pltff: appellee: Kahn, K. Y. & A. For deft. appellant: B. J. Klementowicz, Law Dir.

28526—Law & Fact, C.P.—Jovanovic vs Simich, et al. For pltff. appellee: Strangward, M. L. & M., and Bulkley & B. For defts. appellants: Leanza, L. F. & M.

28527—Law & Fact, Shaker Hgts. M. Ct.—Schwartz vs Strassberg Building Co. For pltff. appellee: Ornstein, D. & B. For deft. appellant: Roemisch & W.

28529—Law & Fact, C.P.—Gerson, et al vs Bieger, et al. For pltffs. appellants: D. B. Shillman. For defts. appellees: Webster & B.

28530—Law & Fact, Pr. Ct.—Mary Schenk, Extrx. of Estate of Anna Burda Podzimek, et al vs Yaro Podzimek. For pltffs. appellees: C. Bernard. For deft. appellant: B. Herzbrun.

28532—Law & Fact, C.P.—Wilson, Jr. vs Wilson. For pltff. appellee: Rollins & M. For deft. appellant: Lavelle & L.

28533—Law & Fact, C.P.—Kelemen vs Kelemen. For pltff. appellee: M. Katz. For deft. appellant: M. A. Sicherman.

28538—Law & Fact, C.P.—Star-Lite Restaurant & Lounge, Inc. vs Liquor Control Commission of State of Ohio, et al. For pltff. appellant: F. Mancino. For deft. appellees: W. B. Saxbe, Atty. Gen.

28539—Law & Fact, C.P.—Star-Lite Restaurant & Lounge, Inc. vs Liquor Control Commission of State of Ohio, et al. For pltff. appellant: F. Mancino. For defts. appellees: W. B. Saxbe, Atty. Gen.

28541—Law & Fact, C.P. Cr.—State of Ohio vs Julius Highsmith, et al. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: (Julius Highsmith) C. E. McLeod.

28542—Law & Fact, C.P. Cr.—State of Ohio vs Solomon, Jr. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: C. W. Lazzaro.

MONDAY, MAY 15

9:30 A. M.

Motions, Demurrers and Applications. Law and Fact Call. Dismissal List.

Following cases to be heard on merits:

27950—Law, Parma M. Ct.—City of Parma vs Bachstein. For pltff. appellee: A. Boyko. For deft. appellant: B. Urbancic.

1:30 P. M.

28164—Law, C. P. Cr.—State of Ohio vs Armstrong. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: P. P.

28194—Law, Juv. Ct.—Mroczkowski vs Mroczkowski, etc. For pltff. appellee: Starkoff, Y. & E. For deft. appellant: R. E. Loeb.

TUESDAY, MAY 16

9:30 A. M.

28257—Law, C. P.—DeMichele vs Smith. For pltff. appellee: E. I. Stillman. For deft. appellant: Arter, H. W. & V.

28295—Law; C. P. Cr.—State of Ohio vs Johns. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: P. P.

1:30 P. M.

28271—Law, Juv. Ct.—In the matter of Randolph Wilson. For appellant: C. D. Rogers.

28273—Law, Euclid M. Ct.—Cleveland Management, Inc. vs Iafornaro et al. For pltff. appellee: V. M. Javitch. For defts. appellants: Lograsso & L.

WEDNESDAY, MAY 17

9:30 A. M.

26489—Law, C. P. Cr.—State of Ohio vs Walker. For pltff. appellee: J. T. Corrigan, Pros. Atty., C. Fleming. For deft. appellant: Edw. Brown, Public Defender's Office.

28001—Law, C. P. Cr.—State of Ohio vs Reed. For pltff. appellee: J. T. Corrigan, Pros. Atty. For deft. appellant: S. Lesser.

1:30 P. M.

28279—Law, C. P. Cr.—State of Ohio vs Clark. For pltff. appellee: J. T. Corrigan; Pros. Atty. For deft. appellant: P. P.

28291—Law, Cleve. Hts. M. Ct.—City of Cleveland Heights vs Ptasznik, etc. For pltff. appellee: P. Fredericks. For deft. appellant: G. Braun.

THURSDAY, MAY 18

9:30 A. M.

28073—Law, Garfield Hts. M. C.—City of Maple Heights vs Fisher. For pltff. appellee: D. Fallon. For deft. appellant: Wm. L. Blake.

28118—Law, C. P. Cr.—State of Ohio vs Atherton et al. For pltff. appellee: J. T. Corrigan, Pros. Atty. For defts. appellants: J. C. Carnes and F. H. Mandel.

1:30 P. M.

28302—Law, C. P.—Fondale vs City of Fairview Park, O., et al. For appellant appellee: Wm. J. McCrone. For appellees appellants: R. W. Krewson.

28344—Law, C. P.—Barrett vs Barrett. For pltff. appellee: Nyerges & N. For deft. appellant: A. D. Nesbitt.

In Toronto, an optometrist posted a sign in his window: "Eyes Examined While You Wait".

27746—Mandamus—The State of Ohio ex rel. Vincent E. Donnelly et al vs The City of Fairview Park, O., et al. Writ denied. Exceptions. O. S. J. See Memorandum to lawyers ordered filed with the papers in the case. (Corrigan, C. J., White, J., Artl, J., concur).

28077—Cleve. M. C.—Wooten vs J. J. White Products Co., etc. Judgment reversed as contrary to law for reason that the amount of verdict is so excessive as to establish passion and prejudice on the part of the jury and cause remanded for further proceedings according to law. Exceptions. O. S. J. (Corrigan, C. J., Skeel, J., Silbert, J., concur).

28098—Juv. Ct.—In re: Rebecca Whitmer, believed to be a dependent child. Appeal by Betty Whitmer. Judgment reversed as contrary to law in that Sec. 5103.16, R. C. has no application to the facts in this case as disclosed by the record. Cause remanded for further proceedings according to law. Exceptions. O. S. J. (Same).

27942—Cleve. M. C.—Admiral Merchant's Motor Freight vs Glenn Cartage Co. Judgment reversed as contrary to law for reason that court below directed a verdict for plaintiff at close of all the evidence, when, as shown by the record, issues of fact were presented upon which reasonable minds could come to different conclusions on question of plaintiff's contributory negligence and question of proximate cause. Cause remanded for further proceedings according to law. Exceptions. O. S. J. (Same.)

27943—Cleve. M. C.—Same vs Same. Same. (Same).

28326—Cleve. M. C.—Carter vs The Paramount Finance Co. Judgment reversed as contrary to law. Action in the Municipal Court constitutes a collateral attack, contrary to law, on a subsisting judgment by the Court of Common Pleas of Summit County which had not been satisfied. Judgment of Municipal Court set aside and held for naught and final judgment for deft. Exceptions. O. S. J. (Wasserman, P. J., White, J., Artl, J., concur).

27920—C. P.—Miller vs Kubick, Jr., et al. Judgment reversed as contrary to law and cause remanded for further proceedings according to law for the reason that prejudicial error was committed by the trial court which prevented plaintiff from having a fair trial in that on the state of the record the trial court invaded the province of the jury in finding that plaintiff's driver was negligent as a matter of law. Prejudicial error was also committed by the trial court in refusing to give Special Charge No. 8 before argument as requested by pltff. Other assignments of error overruled. Exceptions. O. S. J. (Corrigan, C. J., Skeel, J., Silbert, J., concur).

MOTION DOCKET

28381-28382—Rasmussen, admrx. of the Estate of Christine Mueller vs Eschbacher, Jr. Motion by pltff. appellee to dismiss appeal overruled. Exceptions. (Corrigan, C. J., Wasserman, J., Artl, J., concur).

27889—The 931 East Boulevard Co., etc. vs City of Cleveland et al. Application by pltff. appellant for new trial denied. Exceptions. (Artl, C. J., Silbert, J., White, J., concur).

OHIO SUPREME COURT

Hon. Kingsley A. Taft, Chief Justice, Hon. Charles B. Zimmerman, Hon. John M. Matthias, Hon. C. William O'Neill, Hon. Paul M. Herbert, Hon. Louis J. Schneider, Jr. and Hon. Paul W. Brown, Judges.

THOMAS L. STARTZMAN, Clerk.

MERIT DOCKET

40298—Olin Mathieson Chemical Corp., Winchester Western Div., Appellant vs The Ontario Store of Toledo, Ohio, Inc., Appellee. Lucas County. Certified by the Court of Appeals. Judgment reversed on authority of Olin Mathieson Chemical Corp. vs Ontario Store of Price Hill, Ohio, Inc., 9 Ohio St. 2d 67. Taft, C. J. Zimmerman, Matthias, Herbert, Schneider and Brown, JJ., concur.

40397—L. John Bloch, Appellant vs Firemen's Fund, Inc. Co., Appellee. Hamilton County. Appeal from the Court of Appeals. Dismissed by agreement of parties.

40488—Elsie Terwoord, Appellant vs Clinton Harrison, Appellee. Cuyahoga County. Appeal from the Court of Appeals. Judgment reyersed. Taft, C. J., Zimmerman, Matthias, O'Neill, Herbert Schneider and Brown, JJ., concur.

40518-William Warner vs W. Anthony Torsel, et al.; J. Harvey Crow, Appellant; Carl Mumma, et al., Appellees. Clark County. Appeal from the Court of Appeals. Dismissed, sua sponte, no substantial constitutional question involved. Taft, C. J., Zimmerman, Matthias, O'Neill, Herbert, Schneider and Brown, JJ., concur.

40521—The State of Ohio, Appellee vs Dorsie Conley, Appellant. Hamilton County. Appeal from the Court of Appeals. Dismissed, sua sponte, no substantial constitutional question involved. Taft, C. J., Zimmerman, Matthias, O'Neill, Herbert, Schneider and Brown, JJ., concur.

40525—The State of Ohio, Appellee vs Daniel N. Woods, Appellant. Mahoning County. Appeal from the Court of Appeals. Dismissed, sua sponte, no substantial constitutional question involved. Taft, C. J. Zimmerman, Matthias, O'Neill, Herbert, Schneider and Brown, JJ., concur.

Dorsie Conley, Appellant. H... County. For leave to appeal ruled.

40525—The State of Ohio, App... Daniel N. Woods, Appellant. M... County. For leave to appeal. Ov...

40582—The State of Ohio, App... Frederick Arno Leimgruber, A... Wood County. To certify recor... ruled.

40593—The State of Ohio, App... Larry McCormick, Appellant. ... County. For leave to appeal. Ov...

40638—In re, Will of Virginia ... kinpaugh: Barnes B. Peckinpau... pellant. Lucas County. To cert... ord. Dismissed for want of prep...

40640—The Baltimore & Ohio ... Appellee vs Farm Bureau Co-op... Appellant. Butler County. To ... record. Overruled.

40642—The State of Ohio, App... James Forest Tutt, Appellant. ... ton County. To certify record... ruled.

40644—The State of Ohio, App... George Garfield Gorring, Ap... Summit County. For leave to ... Overruled.

40657—The State of Ohio, App... David Myers Dermon, Appellant... ilton County. To certify record... ruled.

40658—The State of Ohio, App... Herbert Trout, Appellant. F... County. For leave to appeal. Ov...

40686—Michael Wallo, Appe... Mary Wallo, Appellant. Cu... County. To certify record. Overr...

40687—The State of Ohio, App... John H. Knotts, Appellant. ... County. To certify record. Ov...

40690—The State of Ohio, App... Thomas Licavoli, Appellant. ... County. To certify record. Ov...

40692—The State of Ohio, App... Paul Percy Davis, Appellant. ... County. To certify record. Overr...

40700—Midland Guardian Acc... Co., Appellant vs Ohio Valley I... Appellee. Hamilton County. To ... record. Overruled.

40718—Burton L. Harwick, Ap... vs Liquor Control Commission ... Appellee. Lucas County. To certi... ord. Overruled.

40722—Barbara A. Turner, Ap... vs Michael A. Buchman, Appelle... eca County. To certify record... ruled.

40728—Dennis James Frazier, ... Appellants vs American Agg... Corp., et al., Appellees. Licking ... To certify record. Overruled.

40737—The State of Ohio, App... Wilbur M. Jeffords, Appellant. ... County. To certify record. Overr...

40777—Harold C. Foreman, et ... pellants vs City of Bellefontai... pellee. Logan County. To certi... ord. Overruled.

40817 and 40818—City of Tole... pellee vs Robert Knisley, Ap... Lucas County. To dismiss ... Overruled.

REHEARING DOCKET

40114-Lee Francis, Appellant ... trude Bieber, Appellee. Geauga ... Rehearing denied.

40166—The State, ex rel. J... Platz, Jr. vs Anthony J. Mucci. ... Warranto. Rehearing denied.

40474—The Gates Co., Appell... Housing Appeals Board of the ... Columbus, et al., Appellees. F... County. Rehearing denied.

40903—The State, ex rel. J... Foreman, et al. vs Ted W. Brow... retary of State. In Mandamu... hearing denied.

RECORDER'S OFFICE

MARK McELROY, Rec...

(CONTINUED)

CITY DEEDS

Orlando, Mary to Mike Antonell... 50.03 ft. Woodland Ave. .... Mtgd. to Park View Federal ... Assn., $10,500.

Hart, Helene E. D. to State o... pt Sec. 3, 4731 sq. ft. Riverda... .....

Leister, Julia et al to Katherine ... ter, pt ol 29, 75.53 ft. No. 781... Ave. .....

Diaz, Rodulfo and Hortensin R. ... Perez, sl 6, 40 ft. No. 1428 We... St. ..... Subject to mtg. to Keystone ... Co.

Marinoni, Victor, extr. estate o... Marinoni, to Margaret Perry, ... 21,22, 39.5 ft. School Ave., ... terest) .....

Marinoni, Angelina to Same, ... (1/2 interest) .... All mtgd. to Cleveland Tru... $13,000.

Hier, Chas. E. and Nellie A. to ... and Maria K. Trybus, sl 6, ... Block A., 40 ft. No. 4243 We... St. .....

Mtgd. to Cleveland Trust Co.,

Kesic, Mary to Josephine Gibbs ... 40 ft. Arcade Ave., quit claim

Leonard Simon Realty Co. to E... Willie Ferguson, sl 56, pt sl ... No. 9011 Harris Ct. .... Subject to mtg. to United ... Assn. Remtgd., $7700.

SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1247.

Supreme Court, U.S.
FILED
APR 17 1968
JOHN F. DAVIS, CLERK

THE 931 EAST BOULEVARD COMPANY,

Petitioner,

v.

CITY OF CLEVELAND, WHITE MOTOR CORPORATION, EATON MANUFACTURING COMPANY, PARK DROP FORGE COMPANY, AND ROCKEFELLER BROTHERS FUND, INC.,

Respondents.

RESPONDENTS' BRIEF OPPOSING CERTIORARI.

PAUL D. WHITE,
Director of Law,
SALVATORE R. CALANDRA,
GEORGE J. DINDA,
Assistant Directors of Law,
City Hall, Cleveland, Ohio,
Attorneys for Respondent City of Cleveland.

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ROBERT W. WHEELER,
DAVID A. NELSON,
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Cleveland, Ohio,
Attorneys for Respondents White Motor Corporation and Park Drop Forge Company.

EDWARD D. CROCKER,
ARTER, HADDEN, WYKOFF & VAN DUZER,
1144 Union Commerce Bldg.,
Cleveland, Ohio,
Attorneys for Respondent Eaton Manufacturing Company.

ARTHUR E. PETERSILGE,
SCHLATZ & PETERSILGE,
Citizens Bldg.,
Cleveland, Ohio,
Attorneys for Respondent Rockefeller Brothers Fund, Inc.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) CH-1-8427

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I. Since Petitioner Was Charged With Constructive Notice of the Order Overruling Its Application For a New Trial, and Since the Court of Appeals Announced Such Order in Accordance With Its Established Court Rules and in a Manner Reasonably Calculated to Give Actual Notice, the Court Was Under No Constitutional Mandate to Furnish Any Additional Notice ---------- 5

II. The Judgment of the Ohio Court Rested on an Adequate State Ground in Any Event, Since Under Ohio Law Petitioner Had Lost Its Right to an Appeal on the Merits Long Before the Date on Which the Application For a "New Trial" Was Overruled ---------- 8

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Link v. Wabash Railroad Co., 370 U. S. 626 ---------- 6

McKee v. Clark, 55 Ohio L. Abs. 496, 90 N. E. 2d 584 (Ct. App. Franklin, 1949) ---------- 8, 9

Mullane v. Central Hanover Bank and Trust Company, 339 U. S. 306 ---------- 7

Nomina v. Eggeman, 188 N. E. 2nd 440 (C. P. Putnam, 1962) ---------- 5

Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co., 385 U. S. 32 ---------- 11

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1247.

THE 931 EAST BOULEVARD COMPANY,

Petitioner,

v.

CITY OF CLEVELAND, WHITE MOTOR CORPORATION, EATON MANUFACTURING COMPANY, PARK DROP FORGE COMPANY, AND ROCKEFELLER BROTHERS FUND, INC.,

Respondents.

RESPONDENTS' BRIEF OPPOSING CERTIORARI.

QUESTIONS PRESENTED.

I. Where the appellant is charged with constructive notice of the entry of an order by the Ohio Court of Appeals, and notice of the entry is also given by publication in the exact manner provided for by the Court Rules, does the Federal Constitution require the Ohio Court to give some additional type of notice, even though none was anticipated by appellant's counsel?

Respondents submit that the answer to this question is "no." Should the answer be "yes," however, the following question would then be presented:

II. Where counsel for the appellant receives actual notice of an adverse judgment on the merits of his case in the Ohio Court of Appeals, but loses the opportunity to appeal to the Supreme Court of Ohio by following the wrong procedure under Ohio law, must the order in which the Court of Appeals subsequently rejects that procedure

be communicated to appellant by means other than those which the Court normally uses, even though the date of the order is of no significance under Ohio law?

STATEMENT OF THE CASE.

Alleging that it was the victim of an illegal "conspiracy" between respondent City of Cleveland and the other respondents herein, petitioner brought suit in the Common Pleas Court of Cuyahoga County, Ohio, to enjoin the respondent City from exercising its power of eminent domain to acquire, for public park purposes, a parcel of land owned by petitioner.

After a trial on the merits, the Common Pleas Court held that there was no illegal conspiracy and that petitioner was not entitled to an injunction. Judgment was accordingly entered in favor of respondents.

Petitioner then perfected an appeal to the Court of Appeals for the Eighth Appellate District of Ohio. The appeal was fully briefed and argued, and on January 12, 1967, the Court of Appeals announced its unanimous decision in favor of respondents. A journal entry reflecting the decision of the Court of Appeals on the merits was circulated among counsel for all of the parties, and this entry was approved by the Court and filed with the clerk for journalization on January 31, 1967.

Respondents' counsel had actual knowledge of the decision rendered by the Court of Appeals on the merits, and had actual knowledge of the journal entry of January 31, 1967, in which the Court of Appeals denied the petition for injunctive relief. Contrary to the implication petitioner may inadvertently have conveyed by its formulation of the first "question presented" at page 2 of the petition for certiorari, petitioner's counsel clearly *did* have "actual notice of an adverse ruling denying injunctive relief * * *

[before] time for appeal from that adverse ruling had expired * * *."

On February 10, 1967—well within the twenty-day period prescribed by Ohio law for perfecting an appeal to the Supreme Court of Ohio* petitioner filed in the Court of Appeals a pleading denominated an "application for a new trial." In this application** respondent asked the Court of Appeals for an order vacating the judgment of January 31, 1967, and granting a "new trial" in the Court of Appeals. As will be shown, Ohio law makes no provision for seeking a new trial in a reviewing court.

February 20, 1967—the last date on which petitioner was entitled to perfect an appeal to the Ohio Supreme Court—came and went without petitioner having filed the required notice of appeal. Instead, petitioner's counsel appeared in the Court of Appeals on that day and orally requested additional time within which to file a brief in support of the "application for a new trial." On February 23, 1967, petitioner was given leave to file such a brief by March 20, and respondents were directed to file answer briefs by April 20.

These briefs were duly filed within the time allowed, and on April 20, 1967, petitioner filed a reply brief in support if its application for a new trial.

Two weeks later, on May 4, 1967, the Court of Appeals entered an order denying the application for a new trial. In accordance with its regular practice, of which petitioner's counsel were admittedly aware,† the Court of Appeals caused notice of this ruling to be published on the same date under the "motion docket" section of the

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* See Ohio Revised Code Section 2505.07, the text of which is reproduced at pages 42 and 43 of the petition for certiorari.

** The full text is printed in the appendix at page 13, *infra*.

† See page 15 of the petition for certiorari.

column in *The Daily Legal News and Cleveland Reporter* wherein decisions of the Court of Appeals are reported. Only one other ruling was reported in the motion docket section on that date.

On June 16, 1967, petitioner filed a motion asking the Court of Appeals for judgment on its application for a new trial, or, in the alternative, for an order vacating the entry of May 4, 1967.* This motion was accompanied by an affidavit ** in which it was indicated that petitioner's counsel had not learned of the May 4 entry until June 7, 1967, notwithstanding that an employee of petitioner's counsel had been instructed to examine the *Legal News* regularly for notices of the actions taken by the Court of Appeals.

Petitioner's motion of June 16 was overruled, and the Supreme Court of Ohio subsequently rejected an appeal from the order overruling that motion. Petitioner now asks this Court for issuance of a writ of certiorari. For the reasons stated below, certiorari should be denied.

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* The text of the June 16 motion is set forth in the appendix at page 13, *infra*.

** The text of the affidavit is set forth at page 41 of the petition for certiorari.

REASONS FOR DENYING CERTIORARI.

I. Since Petitioner Was Charged With Constructive Notice of the Order Overruling Its Application For a New Trial, and Since the Court of Appeals Announced Such Order in Accordance With Its Established Court Rules and in a Manner Reasonably Calculated to Give Actual Notice, the Court Was Under No Constitutional Mandate to Furnish Any Additional Notice.

It has long been considered hornbook law that once a person comes into court as a party, he is charged with notice of all subsequent steps taken in the cause down to and including judgment. *Irving Trust Co. v. Spruce Apartments,* 44 F. 2d 218 at 222 (E. D. Pa. 1930). Cf. 66 *C. J. S.*, Notice, Section 12, at page 648. Such is unquestionably the rule followed by Ohio courts. See *Nomina v. Eggeman,* 188 N. E. 2nd 440, 442 (C. P. Putnam, 1962), where the Ohio cases are summarized as follows:

> "All parties must take notice of all court orders and all procedures of the trial. The fact that one may be a non-resident does not require special notices by the Court. The party must keep himself advised. Brickman v. Shale, 11 Ohio Cir. Ct. R., N. S., 41, 20 Ohio Cir. Ct. R. 372, aff'd 82 Ohio St. 425, 92 N. E. 1109; Pike v. Bradford, Dayton 295; Hahn v. McBride, 88 Ohio St. 511; 103 N. E. 760; Burrell v. Anchor F. Ins. Co., 3 Ohio N. R., N. S., 321, 15 Ohio Dec. N. P. 303, circuit court, aff'd 74 Ohio St. 465, 78 N. E. 1116; Southwood v. Jamison, 66 Ohio St. 290, 64 N. E. 135."

As a matter of convenience to counsel, the rules of the Ohio Courts of Appeals provide that in addition to the constructive notice which is automatically afforded to the parties in a cause when a ruling is entered in the official court records, notice of such rulings shall also be given either by mail or by publication in a daily legal news-

paper.* The Court of Appeals for the Eighth Judicial District of Ohio, which includes the City of Cleveland, has for many years followed the practice of publishing notice of its rulings in *The Daily Legal News and Cleveland Reporter,* rather than giving notice by mail. The Court did not capriciously single out the case at bar for giving notice by publication; it has uniformly followed the publication provision, as counsel for petitioner were perfectly well aware during the time that they were awaiting the Court's ruling on the motion for a new trial.

Under these circumstances, petitioner's counsel should reasonably have been expected to obtain timely knowledge of the Court's ruling, either from the notice published in the *Legal News* or from an inspection of the records at the courthouse. Once their reply brief had been filed on April 20, 1967, petitioner's counsel had every reason to expect that a ruling would be forthcoming promptly, and that such ruling would be readily accessible to anyone who wanted to check the docket at the courthouse, as counsel apparently did on June 7. Counsel knew further that notice of the ruling would not be mailed, but would be published in the Court of Appeals' motion docket column in the *Legal News.*

Knowing these facts, counsel should have been able to keep informed of the status of the case; and the Federal Constitution does not entitle petitioner to escape the consequences of its counsel's failure to keep informed. As stated in the majority opinion in *Link v. Wabash Railroad Co.*, 370 U. S. 626 at 633 and 634:

> "Petitioner voluntarily chose this attorney as his representative in the action, and he can not now avoid the consequences of the acts or omissions of this freely

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* See Rule VIII of the rules of the Courts of Appeals, set forth at pages 39 and 40 of the petition for certiorari.

> selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' Smith v. Ayre, 101 U. S. 320, 326."

The notice that was published in the *Legal News* on May 4 did not become constitutionally inadequate merely because petitioner's counsel overlooked it, any more than notice by mail would have been constitutionally inadequate if counsel had inadvertently misplaced a letter or card containing such notice.

The landmark case of *Mullane v. Central Hanover Bank and Trust Company,* 339 U. S. 306, on which petitioner places its primary reliance, dealt with the type of notice that must *precede* an adjudication of property rights. The question in *Mullane* was whether notice by publication was reasonably calculated to give knowledge of a forthcoming adjudication to a person who was not yet a party before the court, so that such person might be afforded an opportunity to obtain counsel, come into court and be heard.

No such question is presented in the instant case. Here the adjudication with respect to petitioner's property rights had been initiated by petitioner itself. Petitioner had voluntarily come into court, and had taken full advantage of its right to be heard. Neither logic nor authority supports petitioner's contention that as an active party, represented by counsel and "deeply committed" to challenging the respondent City's right to exercise its power of eminent domain, petitioner was constitutionally entitled to be treated as though it were not a party and had no reason to know of the lawsuit or to follow its progress.

II. The Judgment of the Ohio Court Rested on an Adequate State Ground in Any Event, Since Under Ohio Law Petitioner Had Lost Its Right to an Appeal on the Merits Long Before the Date on Which the Application For a "New Trial" Was Overruled.

Where denial of a motion to vacate the judgment of a state appellate court rests upon an adequate state ground, such as the petitioner's choice of the wrong remedy under local law, certiorari should be denied regardless of what force the petitioner's constitutional argument may have. *Edelman v. California*, 344 U. S. 357, at 361 and 362. Even if the Ohio Court of Appeals used a constitutionally inadequate method to announce its order overruling the motion for a new trial, certiorari should still be denied if the decision to let that order stand is justified by petitioner's choice of the wrong remedy under Ohio law.

In moving the Court of Appeals for a new trial, petitioner did choose the wrong remedy. While the Ohio statutes governing appellate procedure authorize an application for reconsideration, petitioner's motion was not filed within the time which the statute prescribes for filing such applications.* The Ohio statutes do not provide for a motion for a new trial in a reviewing court. See *McKee v. Clark*, 55 Ohio L. Abs. 496, 90 N. E. 2d 584 (Ct. App. Franklin, 1949), where it was held that:

> "There is no provision in the General Code for the filing of a motion for a new trial in a reviewing court and therefore the date of the overruling of the appellant's motion for a new trial is of no significance." **

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* See Ohio Revised Code Section 2505.071, the text of which is set out in the appendix at page 14, *infra*.

** Respondents cited this case to the Court of Appeals in their brief opposing the motion for a new trial, and to the Ohio Supreme Court in their brief opposing jurisdiction in that court.

Ohio Revised Code Section 2321.19, cited at page 4 of the petition for certiorari as authority for filing an application for a new trial, does not relate to appellate procedure. The application for a new trial to which that statute refers is the application authorized in Ohio Revised Code Section 2321.17. Section 2321.17 is found in Title XXIII of the Code, which relates to the Common Pleas Court; it provides that under certain conditions "a final order, judgment, or decree shall be vacated and a new trial granted *by the trial court* on the application of a party aggrieved * * *." (Emphasis supplied.) By the same token, Ohio Revised Code Section 2321.19 provides that such application for a new trial "must be made within ten days after the journal entry of a final order, judgment, or decree has been approved *by the trial court* * * *." (Emphasis supplied.) The trial court in the instant case was the Court of Common Pleas, which had entered its judgment almost a year before the application for a new trial was filed in the Court of Appeals.

Since the Ohio statutes do not provide for a motion for a new trial in a reviewing court, and since petitioner failed to make a timely application for reconsideration, the motion that petitioner filed in the Court of Appeals on February 10, 1967, did not and could not enlarge the time for perfecting an appeal to the Ohio Supreme Court. Petitioner's right to appeal to the Supreme Court on the merits expired on February 20, 1967, twenty days after the Court of Appeals entered its judgment denying injunctive relief. Having missed the boat in February, petitioner did not have a second chance to catch the boat in May. No such second chance would have been presented even if petitioner had learned immediately of the overruling of the motion for a new trial on May 4th. As pointed out in *McKee v. Clark*, 55 Ohio L. Abs. 496, 90 N. E. 2d 584

(Ct. App. Franklin, 1949), *supra*, "the date of the overruling of the appellant's motion for a new trial is of no significance."

Having lost its right of appeal because it chose to pursue the wrong procedure, petitioner has no basis for a claim that due process of law has been denied. See *American Surety Company v. Baldwin*, 287 U. S. 156 at 168 and 169, where this Court, speaking through Justice Brandeis, made the following statement:

> "The opportunity afforded by state practice was lost because the Surety Company inadvertently pursued the wrong procedure in the state courts. Instead of moving to vacate, it should have appealed directly to the state Supreme Court. When later it pursued the proper course, the time for appealing had elapsed. The fact that its opportunity for a hearing was lost because misapprehension as to the appropriate remedy was not removed by judicial decision until it was too late to rectify the error, does not furnish the basis for a claim that due process of law has been denied."

Justice Brandeis' reasoning fits this case perfectly. Petitioner should have appealed directly to the Supreme Court of Ohio, within the time prescribed by statute, instead of moving for a new trial. The opportunity to appeal on the merits was lost on February 20, 1967, when the statutory time for such an appeal expired. Under Ohio law, it would have been too late for petitioner to rectify its error after that time irrespective of when it learned that the wrong procedure had been followed; and nothing in the Federal Constitution required the state courts to extend the time for an appeal beyond the time fixed by the Ohio statute.

With regard to appeals within the federal court system, this Court, in the exercise of its discretion, has dis-

missed an appeal because it was docketed twenty-two days after the expiration of the period prescribed by Court Rule. *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.*, 385 U. S. 32. Surely the Ohio courts are under no constitutional mandate to shut their eyes to a similar time limitation that is prescribed not by rule of court, but by statute.

CONCLUSION.

As an active party, represented by counsel, petitioner knew that there would be a ruling on its motion for a new trial, knew that such ruling would be entered in the Court's docket and journal, and knew that notice of the entry would be given in the *Legal News* rather than by mail. The notice thus given was reasonably calculated to inform petitioner's counsel of the Court's action, was given in the manner actually anticipated by petitioner's counsel, and was not constitutionally defective.

Moreover, petitioner's rights were in no way prejudiced by its failure to obtain immediate knowledge of the overruling of the motion for a new trial. By pursuing the wrong remedy under Ohio law, petitioner had long since lost its right of further appeal on the merits of the case; and that was the fact regardless of the kind of notice given when the motion for a new trial was overruled.

The petition for a writ of certiorari presents no substantial federal question, and certiorari should be denied.

Respectfully submitted,

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APPENDIX.

APPLICATION FOR A NEW TRIAL.

(Filed in the Court of Appeals on February 10, 1967.)

The appellant, The 931 East Boulevard Company, hereby applies to the Court for an order vacating the final order and judgment entered by this Court herein on January 31, 1967, and granting to the appellant a new trial of this cause in this Court for the following causes, each of which materially affects the substantial rights of the appellant:

1. the final order, judgment and decree of this Court is not sustained by sufficient evidence;
2. the final order, judgment and decree is contrary to law; and
3. error of law occurred at the trial of this cause in this Court and was affected [*sic*] to by the appellant.

MOTION FOR JUDGMENT OR, IN THE ALTERNATIVE, TO VACATE JUDGMENT OR ORDER.

(Filed in the Court of Appeals on June 16, 1967.)

The appellant, The 931 East Boulevard Company, moves the Court for judgment on its application for new trial or, in the alternative, an order vacating and setting aside the purported journal entry which was ostensibly entered herein on May 4, 1967, which alleged order reads as follows: "Application by plaintiff-appellant for new trial denied. Exceptions."

This Motion is made for the reasons set forth in the attached brief and upon the facts set forth in the attached affidavit.

STATUTES.

Ohio Revised Code § 2505.071. Application for reconsideration of cause or motion.

Application for reconsideration of any cause or motion submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court in writing, and filed with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the earlier. If an application for reconsideration has been filed within such time, the court shall not journalize the order or judgment until such application has been disposed of.

No oral argument of an application for reconsideration shall be permitted except at the request of the court on its own motion.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1247.

THE 931 EAST BOULEVARD COMPANY,

Petitioner,

vs.

CITY OF CLEVELAND, WHITE MOTOR CORPORATION, EATON MANUFACTURING COMPANY, PARK DROP FORGE COMPANY and ROCKEFELLER BROTHERS FUND, INC.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Inasmuch as respondents' arguments on the merits of the questions presented by the petition are refuted by petitioner's statement of reasons for granting the writ, no reply is made to the first item of respondents' brief. Petitioner files this reply brief, therefore, to answer respondents' contention that the judgment of the Court of Appeals rested on an adequate state ground.[1]

Respondents argue that petitioner's right of appeal was lost because petitioner followed the wrong procedure in filing a motion for new trial in the Court of Appeals. The defect in respondents' position lies in the fact that even if the Court of Appeals had denied the motion for new trial upon a determination that such a motion could

[1] Respondents' brief, pp. 8-11.

not be presented to it, an assumption which petitioner denies,[2] petitioner, nonetheless, was entitled to notice of *that* decision in a manner consistent with due process. For if the Court of Appeals overruled the motion on the ground assumed by respondents, petitioner was denied its opportunity to perfect an appeal to obtain review of *that* order, in the same manner as though the ruling had been made on the merits of the motion.

Thus, it is readily apparent that respondents' argument predicated upon the alleged existence of an independent state ground has no merit whatever and serves merely to becloud the important issues presented in the petition.

Moreover, a review of the record and the Ohio procedural statutes reveals that respondents are in error as to their assumption that an adequate state ground was the basis of the ruling on the motion for new trial. The order reads, in full:

> "Application by plaintiff appellant for new trial denied. Exceptions."

No ground for the denial is stated.

Respondents argue, however, that Section 2321.19, Ohio Revised Code,[3] pertaining to the time within which an application for new trial must be filed, relates to proceedings had in a "trial court," rather than an appellate court. They fail to recognize that the proceedings before the Court of Appeals were on law and fact, and the matter was therefore heard *de novo,* the court sitting as a *trial* court. Section 2505.01(C), Ohio Revised Code, defines an "appeal on questions of law and fact" as a "rehearing and retrial of a cause upon the law and the facts and is the

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[2] See argument, *infra,* pp. 2-4.

[3] The text of which is set out in the Petition, Appendix, p. 42.

same as an 'appeal on questions of fact.' " Section 2505.21, Ohio Revised Code, further provides:

> "An appeal taken on questions of law and fact entitles the party to a hearing of the facts de novo * * *."

Indeed, the journal entry of the Court of Appeals recited that the case "came on for hearing upon the plaintiff's second amended petition, and upon the answers thereto * * * and upon the evidence, including the transcript of testimony taken and the exhibits introduced in evidence in the court below * * *."[4] The judgment of the court was not one of affirmance, but rather "that the plaintiff's second amended petition be and is hereby denied."[5]

The Ohio code of civil procedure expressly authorizes the filing of a motion for new trial in the Court of Appeals. Section 2325.01, Ohio Revised Code, entitled, *Grounds for vacating or modifying final order, judgment or decree by court of common pleas or court of appeals,* provides:

> "The court of common pleas or the *court of appeals* may vacate or modify its own final order, judgment or decree after the term at which it was made:
>
> (a) *By granting a new trial* of the cause within the manner provided in sections 2321.19 and 2321.21 * * *."

In addition to the statute, the rules of the Court of Appeals for the Eighth Appellate District, Cuyahoga County, Ohio, make special provision for consideration of motions for new trial.[6]

Moreover, *McKee v. Clark,* 55 Ohio L. Abs. 496, 90 N. E. 2d 584 (App. Franklin, 1949), cited by respondents,

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[4] Petition, Appendix, p. 33.

[5] *Ibid.* at p. 38.

[6] Rule X, Additional and Supplemental Rule in the Eighth Appellate District, 25 Page's Ohio Revised Code, 67 Supplement, p. 51.

involved an appeal on law only. The court in that case relies upon its earlier decision in *Kromer v. Kear*, 55 Ohio L. Abs. 385, 90 N. E. 2d 422 (App. Franklin, 1949), in which it held that a motion for new trial is not provided for under the code "where the appeal is on questions of law *only*."[7] As petitioner has noted above, the appeal in the instant case was on questions of law and fact.[8] See *Ohio Motors, Inc. v. Charlesworth*, 59 Ohio L. Abs. 103, 97 N. E. 2d 686 (App. Cuyahoga, 1950).

Finally, in *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932), and *Edelman v. California*, 344 U. S. 357 (1953), cited by respondents as cases in which adequate state grounds for the decisions were recognized, either there had been a prior judicial determination by the state court that the procedure followed was incorrect, or the record clearly established that the procedure employed was wrong. In *Baldwin*, the Court noted that the Supreme Court of Idaho had expressly stated in its opinion in the case on review that the procedure followed was incorrect. In *Edelman*, the Court concluded that the record in the case clearly established the existence of a state ground. In the case at bar, neither the decision of the Court of Appeals, nor the record, indicates in any manner whatever that the motion for new trial was denied on procedural grounds, rather than on the merits.

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[7] 55 Ohio L. Abs. at 386.

[8] The journal entry of the Court of Appeals recites: "This case, being before this Court on appeal on questions of law and fact * * *." Petition, Appendix, p. 33.

CONCLUSION.

Respondents' assertion that an independent state ground exists to sustain the decision of the court of appeals is a smoke screen designed to becloud the real issues presented in this case.

Whether or not the decision of the Court of Appeals denying the motion for new trial was entered on a procedural ground, or the merits, petitioner had a right to perfect an appeal from the order in either event. Petitioner was entitled to notice of the decision in accordance with due process. In addition to the question relating to the denial of due process resulting from the mistake of counsel, the petition for certiorari properly presents for the consideration of the Court the question as to whether the single publication of the decision failed to accord petitioner due process of law, in that the means employed to give the notice "was not reasonably calculated to reach those who could easily be informed by other means at hand." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U. S. 306, 319 (1950).

Furthermore, there is nothing in the record to establish that the Court of Appeals determined that petitioner followed the wrong procedure. To the contrary, the statutes of Ohio expressly authorize the procedure employed by petitioner.

WHEREFORE, petitioner respectfully renews its prayer that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX.

STATUTES.

Ohio Revised Code.

§ 2325.01 Final order, judgment, or decree of court of common pleas or court of appeals may be vacated or modified.

The court of common pleas or the court of appeals may vacate or modify its own final order, judgment, or decree after the term at which it was made:

(A) By granting a new trial of the cause, within the time and in the manner provided in sections 2321.19 and 2325.21 [2321.21] of the Revised Code;

§ 2505.01 Definitions.

As used in the Revised Code:

(A) "Appeal" means all proceedings whereby one court reviews or retries a cause determined by another court, an administrative officer, tribunal, or commission.

(B) "Appeal on questions of law" means a review of a cause upon questions of law including the weight and sufficiency of the evidence.

(C) "Appeal on questions of law and fact" means a rehearing and retrial of a cause upon the law and the facts and is the same as an "appeal on questions of fact."

§ 2505.21 Hearing on appeal.

Appeals taken on questions of law shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant before hearing. Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or specified. Failure to file such briefs and assignments of error

within the time prescribed by the court rules is cause for dismissal of such appeal. All errors assigned shall be passed upon by the court, and in every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state the errors found in the record upon which the judgment of reversal is founded.

An appeal taken on questions of law and fact entitles the party to a hearing and determination of the facts de novo which shall be upon the same or amended pleadings.